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THE LAW

OF

MINES, QUARRIES, AND MINERALS.

THE LAW

OF

MINES, QUARRIES, AND MINERALS.

BY

ROBERT FORSTER MAC SWINNEY, M.A.,
BARRISTER-AT-LAW.

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TO

THE RIGHT HONOURABLE

THE LORD JUSTICE FRY,

THIS BOOK

IS, BY PERMISSION,

Most Respectfully Dedicated.

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PREFACE.

The author has endeavoured in this book to state the Law of Mines as it prevails in England. The few Irish mining decisions, and the Acts of Parliament dealing with mines in Ireland, have also been included. The Scotch and the Colonial Reports (as might be expected) abound with decisions upon mining law; and there are some Scotch and many Colonial mining Statutes. Such of the Scotch decisions as have come before the House of Lords have been included. But it would have been impossible, with the space at the author's disposal, to have entered with any detail into the Scotch or the Colonial law. He has therefore contented himself with short references to about forty of the other principal Scotch decisions in recent years, and to the principal Acts of Parliament dealing with mines in Scotland; and with short references to such of the Colonial decisions as have come before the Privy Council.

The cases have been brought down to the date of publication. But some of them are now reported more

fully or at further stages; with the results noticed in the Addenda.

The author is indebted to his friend Mr. Leonard Bristowe of the Equity Bar for the collection of contemporaneous references in the Table of Cases, a work of much labour. He has also to thank that gentleman for valuable help in the preparation of the Index, and in the passage of the book through the press.

R. F. MacS.

1, New Square, Lincoln's Inn,
February, 1884.

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CORRIGENDA.

P. 2, n. [6]. For 2 A. & E. 578, read 2 A. & E. 593.

Pp. 20, 27, 286, 288, 290, 291, 292, 294, 295, 299, 304, 315, 351. For Humphreys *v.* Brogden, read Humphries *v.* Brogden.

P. 32. For 44 & 45 Vict. c. 47, read 44 & 45 Vict. c. 49.

P. 42, n. [2]. For 27 L. T. 24, read 27 L. T. 64.

P. 295, marginal note. For grantee, read grantor.

P. 493, lines 12 and 15 from top. For surrenderee, read surrenderor.

ADDENDA.

Att.-Gen. of Ontario *v.* Mercer, 8 App. Cas. 767. Add reference, on p. 15, for the meaning of 'lands, mines, minerals, and royalties;' and (to pp. 777 *et seq.* of report) on p. 214, for the meaning of 'royalties.'

Bell *v.* Love, 10 Q. B. D. 547. Add reference (to p. 559 of report) on p. 76, n. [5], and n. [11]. This case (the facts of which are stated at p. 332) is now under appeal to the House of Lords.

Campbell *v.* Wardlaw, 8 App. Cas. 641. Add reference (to p. 647 of report) on pp. 22 *et seq.* for the meaning of open mines; and (to the whole report) on pp. 46 *et seq.* as to the working rights and disabilities of limited owners; and (to the whole report) on p. 168, n. [4], as to the effect of the Scotch Act, 30 & 31 Vict. c. 97, s. 2, sub-s. 3; and (to pp. 649, 650 of report) on p. 169, n. [2].

Chapman *v.* Day, 49 L. T. 436, reversed the decision below cited at p. 354; and laid down, that the remedy for wrongfully withdrawing support may be lost by the death of the wrongdoer.

Dixon *v.* White, cited at p. 337, n. [3], is now reported in 8 App. Cas. 833. Add reference (to pp. 843, 847, 851 of report) on p. 294; and (to pp. 847, 852 of report) on p. 296, n. [2]; and (to pp. 843, 847, 850, 851 of report) on p. 305, n. [8]; and (to the whole report) on p. 334, n. [2].

Mostyn *v.* Lancaster, cited at pp. 236, 237, 246, is now reported in 23 Ch. D. 583.

Newcastle's Estates, cited at pp. 166, 167, is now reported in 24 Ch. D. 129. Add reference on p. 133, n. [7].

Normanton Gas Co. *v.* Pope, 52 L. J. Q. B. 629, cited at pp. 312, 337, 351, 354, also

laid down, that compensation under the Gas Clauses Act is payable as soon as a company construct their works, and for future as well as actual injury. Add reference, accordingly, on p. 346.

Phillips *v.* Homfray, cited at pp. 379, 524, 532, 540, 544, is now reported in 24 Ch. D. 439.

Pountney *v.* Clayton, cited at pp. 268, 287, 294, 297, 299, 311, 329, 330, 331, 338, 340, 342, 348, is now reported in 11 Q. B. D. 820. Add reference (to pp. 826, 842, of report) on p. 329, as to mines outside the 40 yards' limit. The language attributed to Bowen, L.J., in the last four lines on p. 330, and the first two on p. 331, is not in terms borne out by the report in 11 Q. B. D. at pp. 843, 844.

Taylor *v.* Mostyn, cited at pp. 171, 172, is now reported in 23 Ch. D. 583.

Tucker *v.* Linger (the facts of which are stated at pp. 17, 54) was affirmed by the House of Lords, and is now reported in 8 App. Cas. 508. Add reference (to pp. 510, 512, 513, of report) on p. 12 as to the meaning of mineral; and (to pp. 513, 514 of report) on p. 106.

The Scotch Act, 30 & 31 Vict. c. 97, s. 2, sub-s. 3. Add reference on p. 168, n. [4].

MINES, QUARRIES, AND MINERALS.

CHAPTER I.

MEANINGS OF MINE, QUARRY, MINERAL SOIL, AND KINDRED WORDS AND EXPRESSIONS.

Sect. 1.—MINE, VEIN, SEAM, AND QUARRY.

(a) *Difference between Mine and Vein or Seam.*

Definitions of mine.

"Mine" is defined in Johnson's Dictionary as "a place or cavern in the earth, which contains metals or minerals:" in Webster's Dictionary as "a pit or excavation in the earth from which metallic ores or other mineral substances are taken by digging:" in Worcester's Dictionary as "a subterraneous work or excavation for obtaining metals, metallic ores, or other mineral substances, a pit, a cavern;" and in Wharton's Law Lexicon as "an excavation or cavern in the earth, which yields metals or minerals."

Definitions of vein and seam.

"Vein" is defined in Webster's Dictionary as "a seam or layer of any substance more or less wide intersecting a rock or stratum, and not corresponding with the stratification; often limited in the language of miners to such a layer or course of metal or ore;" and in Richardson's Dictionary as "lineal tubes, which convey the blood in animals; lineal streaks in mineral or vegetable bodies." The Encyclopædia Britannica thus describes veins:—"These are fissures or cracks in the rocks . . . which are filled . . . with materials of quite a different nature from the rocks in which the fissures occur."[1] "Seam"

[1] See vol. xvii., p. 621: see also vol. xv., p. 177.

is defined in Webster's Dictionary as "a thin layer or stratum;[1] a narrow vein between two thicker ones; as a seam of coal." Vein and seam appear accordingly to be convertible expressions.

Mine and vein or seam distinguished.

If there are a particular number of veins within or under a piece of land, there are precisely the same number of mines occupying precisely the same areas. In this sense the primary meaning of mine is vein.[2] Consistently, however, with this, each word seems to have a distinct meaning of its own. In strictness a mine is not, it would seem, "properly so called, until it is opened. It is at best but a vein of coals before."[3] Indeed it has been laid down that a grant of "lands and mines," where some of the veins in question are open and others hidden, will only pass the open veins.[4] On the other hand, mines, where unopened mines are spoken of, mean in strictness nothing more nor less than veins or seams.[5] In fact, mine appears in its primary sense to imply openness, and vein or seam appears in its primary sense to exclude that notion. In a secondary sense, however, mine may be said to mean a closed vein. "Although a vein be not open, but close, yet it might be termed a mine—that which is not open may be called a mine."[6] And, on the other hand, veins or seams may, in a secondary sense, be called mines.[7] A mine, like a vein or seam, may be properly so called, although it extends through the properties of a variety of owners.[8] The word mine is, however, frequently used in the

[1] Stratum is defined in Johnson's Dictionary as "a bed: a layer:" and in Webster's as "a bed of earth or rock of any kind formed by natural causes, and consisting usually of a series of layers."

[2] See Abinger *v.* Ashton, 17 Eq. 369, *per* Jessel, M.R.; Ramsay *v.* Blair, 1 App. Cas. 705, *per* Lord Selborne.

[3] See Astry *v.* Ballard, 2 Mod. 193: see Colchester *v.* Kewney, L. R. 2 Ex. 257.

[4] Astry *v.* Ballard, *u. s.*

[5] See Ramsay *v.* Blair, *u. s.*, *per* Lord Selborne.

[6] See Case of Mines, Plowden, 337. See also R. *v.* Foleshill, 2 A. & E. 578.

[7] See Hext *v.* Gill, 7 Ch. 712, *per* Mellish, L.J. A devise, before the Wills Act, of "pits and veins" in and upon certain lands, "together with the rents and profits of such pits and veins," was held to only pass pits and veins which were open at the date of the will: see Brown *v.* Whiteway, 8 Ha. 150. The same case contains a query, whether, since the Wills Act, such a devise would pass pits or veins open at the death of the testator, but there seems no reason to doubt that it would.

[8] Van Mining Co. *v.* Llanidloes, 1 Ex. D. 319.

secondary sense of a section of a vein. For example, that portion of a vein, which is confined within the ambit of a particular property, is in common parlance, and may be with propriety, called a mine. It is so considered for rating purposes.[1] And, of course, it is so considered for the purpose of regulating the rights and duties of its owner in respect of the other portions.[2] On the other hand, the word mine is frequently used in the secondary sense of an aggregation of veins or seams.[3]

(β) *Difference between Mine and Quarry.*

Definitions of quarry.

"Quarry," as distinguished from mine, is defined in Johnson's Dictionary as "a stone mine, a place where they dig stones:" in Webster's Dictionary as "a place, cavern, or pit where stones are cut from the earth for building or other purposes, a stone pit;" and in Worcester's Dictionary as "a stone bed whence building materials are dug or cut, a stone pit." And in the definition of "mine" in Wharton's Law Lexicon it is said—"When stones only are produced, the places from which they are dug out are called quarries."[4] It has also been judicially stated, that the word "quarry" generally means a place where the material is got out in a large shape like blocks, and not where it is got in small pieces, like coal and ironstone.[5] In the lexicographical part of the Encyclopædia Metropolitana the word "mine" is said to be derived from the Latin *minare*, a word of the Lower Ages, signifying *ducere*, to lead, and to mean "to draw or lead, *sc.*, a way or passage underground, a subterraneous duct, course, or passage, whether in search of metals or to destroy fortifications." And in the same work the word "quarry" is said to be derived from the French *quarriere;* and it is added, "in the Latin of the Lower Ages *quadratarius* was a stone cutter, *qui marmora quadrat;* and hence *quarriere*, the place where

Derivations of mine and quarry.

[1] *Ib.* Cf. R. *v.* Foleshill, 2 A. & E. 598.

[2] See Ivimey *v.* Stocker, 1 Ch. 407, 408.

[3] See Spencer *v.* Scurr. 31 Beav. 334. Of course "mine" is hardly ever used in the secondary sense of underground works: see Bowes *v.* Ravensworth, 19 C. B. 516.

[4] For the definitions of "mine" in these works, see *ante*, p. 1.

[5] Jones *v.* Cwmorthen Slate Co., 5 Ex. D. 95, *per* Bramwell, L. J.

he quadrates or cuts the stones in squares." "Quarry" is then defined to be "the place where the stone is cut in squares; generally a stone pit."[1]

Mine and quarry distinguished.

Mode of working generally conclusive.

The true distinction between a mine and a quarry, so far at least as a lawyer is concerned seems, speaking generally, to be best indicated in the Encyclopædia Metropolitana. It is the mode of working the article obtained, and not its chemical or geological features, which generally determines its legal character. If the article is obtained by underground workings, the place from which it is obtained is, properly speaking, a mine: if it is obtained by workings upon or above the ground, the place is, properly speaking, a quarry. "The question is, whether you are working so as to remove the surface, including, perhaps, portions of the lateral surfaces, so as not to leave a roof. Mining is when you begin only on the surface, and by sinking shafts, or driving lateral drifts, you are working so that you make a pit or tunnel, leaving a roof overhead."[2] "A quarry is a work from which stone or other material is obtained by excavation from the surface only. Directly you cease to excavate from the surface, and carry on a subterranean work, it ceases to be a quarry."[3] Indeed, according to the statement in the Encyclopædia Metropolitana, the primary meaning of "mine" was an underground excavation. And it was by successive transitions in its meaning that the word came first to include the place from which minerals are obtained by such an excavation as well as the excavation itself; and secondly, to mean that place alone, without regard to the excavation. "The primary meaning of the word 'mine,' standing alone, is an underground excavation made for the purpose of getting minerals. In leases and similar documents it is commonly used in a slightly different sense. There the word includes the stratum of the minerals as well as the excavation made to win it."[4]

[1] In Jacob's Law Dictionary the word "mines" is most inaccurately defined as "quarries or places whereout anything is digged:" see Bell *v.* Wilson, 2 Dr. & Sm. 400.

[2] See Darvill *v.* Roper, 3 Drew. 299, *per* Kindersley, V.C. See also Bell *v.* Wilson, 2 Dr. & Sm. 399.

[3] See Cleveland *v.* Meyrick, 16 W. R. 105, *per* Malins, V. C.: see also Brown *v.* Chadwick, 7 Ir. C. L. Rep. 108; Listowel *v.* Gibbings, 9 *ib.* 233; Tucker *v.* Linger, 21 Ch. D. 36.

[4] See Mid. R. Co. *v.* Haunchwood, &c. Co., 20 Ch. D. 555, *per* Kay, J.

A brickfield,[1] or a gravel or ordinary clay pit,[2] is, therefore, in the nature of a quarry rather than a mine. On the other hand, a place from which limestone[3] or freestone,[4] obtained by underground workings, was gotten, has been held to be a mine. So it has been held, that a pit from which clay was extracted by underground workings constituted a clay mine.[5] And shares in a slate company, whose operations had been principally carried on underground, and not by open-air workings, have been held to be "shares in mines;" so as to pass under those words in a bequest in a codicil.[6] And a slate quarry, worked by means of underground workings by levels, has been held to be a mine within the meaning of the Met. Mines Reg. Act, 1872.[7] Illustrations.

However, the proper meaning of "mines" may be varied by the context.[8] Thus, works for the getting of slate are assessable to the income tax under the Act 5 & 6 Vict. c. 35, sch. A.[9] as quarries, and not as mines, although the slate be obtained by underground working;[10] the Act distinguishing between "quarries of stone, slate," &c., and "mines," and applying to each a different principle of assessment.[11] On the other hand, in the 77th and following sections of the Rail. Cl. Cons. Act, 1845,[12], the word "mines" obtains from the context a larger meaning than it would otherwise have. These sections are prefaced by the words "And with respect to mines lying under or near the railway be it enacted as follows:"—Sect. 77 then provides,[13] that Exception under Income Tax Act. Exception under Railways Clauses Consolidation Act.

[1] Edmonds *v.* Eastwood, 2 H. & N. 825.

[2] Errington *v.* Met. Ry. Co., 19 Ch. D. 571: Tucker *v.* Linger. 21 *ib.* 36.

[3] R. *v.* Sedgley, 2 B. & Ad. 65.

[4] R. *v.* Dunsford, 2 A. & E. 568.

[5] R. *v.* Brettel, 3 B. & Ad. 424. Cf. R. *v.* Alberbury, 1 East, 534; R. *v.* Woodland, 2 East, 164; R. *v.* Brown, 8 East, 528.

[6] Cleveland *v.* Meyrick, 16 W.R. 104.

[7] 35 & 36 Vict. c. 77: see Sim *v.* Evans, 23 W. R. 730 (cited in Jones *v.* Cwmorthen Slate Co., 4 Ex. D. 97).

[8] Mid. Ry. Co. v. Haunchwood, &c. Co., 20 Ch. D. 555.

[9] See *post*, Chap. XXIII., Sect. 2.

[10] Jones *v.* Cwmorthen Slate Co., *u. s.*, affd. 5 Exch. D. 93.

[11] *Ib.* 99: see *post*, Chap. XXIII., Sect. 2.

[12] 8 & 9 Vict. c. 20.

[13] The sections are as follows:—Sect. 77: "The Company shall not be entitled to any mines of coal, ironstone, slate or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines excepting as aforesaid shall be deemed to be excepted out of the conveyance of

"the Company shall not be entitled to any mines of coal, ironstone, slate, or other minerals," except such parts "as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall" other-

such lands, unless they shall have been expressly named therein and conveyed thereby."

Section 78 :—"If the owner, lessee or occupier of any mines or minerals lying under the railway or any of the works connected therewith, or within the prescribed distance, or where no distance shall be prescribed, 40 yards therefrom, be desirous of working the same, such owner, lessee or occupier shall give to the Company notice in writing of his intention so to do 30 days before the commencement of working, and upon the receipt of such notice, it shall be lawful for the Company to cause such mines to be inspected by any person appointed by them for the purpose, and if it appear to the Company that the working of such mines or minerals is likely to damage the works of the railway, and if the Company be willing to make compensation for such mines or any part thereof to such owner, lessee or occupier thereof, then he shall not work or get the same; and if the Company and such owner, lessee or occupier do not agree as to the amount of such compensation, the same shall be settled as in other cases of disputed compensation."

Section 79 :—"If before the expiration of such 30 days the Company do not state their willingness to treat with such owner, lessee or occupier for the payment of such compensation, it shall be lawful for him to work the said mines, or any part thereof for which the Company shall not have agreed to pay compensation, so that the same be done in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district where the same shall be situate; and if any damage or obstruction be occasioned to the railway or works by improper working of such mines, the same shall be forthwith repaired or removed as the case may require, and such damage made good by the owner, lessee or occupier of such mines or minerals, and at his own expense; and if such repair or removal be not forthwith done, or if the Company shall so think fit, without waiting for the same to be done by such owner, lessee or occupier, it shall be lawful for the Company to execute the same and recover from such owner, lessee or occupier the expense occasioned thereby, by action in any of the superior courts."

Section 80 :—"If the working of any such mines under the railway or works or within the above-mentioned distance therefrom be prevented as aforesaid by reason of apprehended injury to the railway, it shall be lawful for the respective owners, lessees and occupiers of such mines and whose mines shall extend so as to lie on both sides of the railway, to cut and make such and so many airways, headways, gateways or water levels through the mines, measures or strata the working whereof shall be so prevented, as may be requisite to enable them to ventilate, drain and work their said mines; but no such airway, headway, gateway, or water level shall be of greater dimensions or section than the prescribed dimensions and sections, and where no dimensions shall be described (*sic*), not greater than 8ft. wide and 8ft. high, nor shall the same be cut or made upon any part of the railway or works or so as to injure the same or to impede the passage thereon."

wise be deemed to be excepted out of the conveyance. Section 78 provides, that notice shall be given by the owner of his intention to work "any mines or minerals;" that the company may thereupon cause "such mines" to be inspected; and that if the working of "such mines or minerals" be likely to damage

Section 81 :—"The Company shall from time to time pay to the owner, lessee or occupier of any such mines extending so as to lie on both sides of the railway all such additional expenses and losses as shall be incurred by such owner, lessee or occupier by reason of the severance of the lands lying over such mines by the railway or of the continuous working of such mines being interrupted as aforesaid or by reason of the same being worked in such manner and under such restrictions as not to prejudice or injure the railway, and for any minerals not purchased by the Company which cannot be obtained by reason of making and maintaining the railway, and if any dispute or question shall arise between the Company and such owner, lessee or occupier as aforesaid touching the amount of such losses or expenses, the same shall be settled by arbitration."

Section 82 :—"If any loss or damage be sustained by the owner or occupier of the lands lying over any such mines the working whereof shall have been so prevented as aforesaid (and not being the owner, lessee or occupier of such mines) by reason of the making of any such airway or other work as aforesaid, which or any like work would not have been necessary to be made but for the working of such mines having been so prevented as aforesaid, the Company shall make full compensation to such owner or occupier of the surface lands for the loss or damage so sustained by him."

Section 83 :—"For better ascertaining whether any such mines are being worked or have been worked so as to damage the railway or works, it shall be lawful for the Company, after giving 24 hours' notice in writing, to enter upon any lands through or near which the railway passes wherein any such mines are being worked or are supposed so to be, and to enter into and return from any such mines or the works connected therewith; and for that purpose it shall be lawful for them to make use of any apparatus or machinery belonging to the owner, lessee, or occupier of such mines, and to use all necessary means for discovering the distance from the railway to the parts of such mines which are being worked or about so to be."

Section 84 :—"If any such owner, lessee, or occupier of any such mines shall refuse to allow any person appointed by the Company for that purpose to enter into and inspect any such mines or works in manner aforesaid, every person so offending shall for every such refusal forfeit to the Company a sum not exceeding £20."

Section 85 :—"If it appear that any such mines have been worked contrary to the provisions of this or the special Act, the Company may, if they think fit, give notice to the owner, lessee, or occupier thereof to construct such works and to adopt such means as may be necessary or proper for making safe the railway and preventing injury thereto; and if after such notice, any such owner, lessee, or occupier do not forthwith proceed to construct the works necessary for making safe the railway, the Company may themselves construct such works, and recover the expense thereof from such owner, lessee, or occupier, by action in any of the superior courts."

the works, and they be willing to make compensation for "such mines or any part thereof," they may prevent the working or getting. Section 79 provides for the mode of working the said "mines," in case compensation be not made. Sections 83 and 84 empower the company to enter upon any lands in which "any such mines" are being worked to inspect the same. And section 85 provides for the event of "any such mines" being worked contrary to the statutory provisions. From a comparison of these sections, and having regard to the language of the prefacing words, conclusions have been drawn to the following effect:—(1) Sections 77 & 78 were intended for the benefit of railway companies. They were not in the first instance, in purchasing the surface, to be obliged to make compensation in respect of the mines thereunder. If they thought it likely that the mines might not be worked for an indefinite period, they might postpone making such compensation until the necessity for so doing arose.[1] (2) There are *primâ facie* grounds for applying the same principle to surface minerals as to those obtained by underground workings. Otherwise, as, for instance, in the case of a bed of china clay, which usually both is valuable and lies close to the surface, the benefit as well of sections 77 and 78 as of section 83 would be incomplete. And it cannot be said that the application of the principle to surface workings would, as regards section 78, entail a disadvantage upon the companies. There is no greater expense or inconvenience in receiving notices of intended surface than of intended underground workings.[2] And (3) if in other respects there is a doubt, it is resolved by the collocations of the words "mines" and "minerals." In section 77 the word "mines" is clearly used with reference as well to open as to underground workings.

[1] See Fletcher *v.* G. W. R. Co., 4 H. & N. 252, 253, *per* Martin and Watson, BB.; G. W. R. Co. *v.* Fletcher, 5 *ib.* 698, 699, *per* Cockburn, C. J.: L. & N. W. R. Co. *v.* Ackroyd, 31 L. J. Ch. 590, *per* Wood, V. C.; G. W. R. Co. *v.* Bennett, L. R. 2 H. L. 38, 40, 42, *per* Lords Chelmsford, Cranworth, and Westbury; Smith *v.* G. W. R. Co., 3 App. Cas. 175, *per* Lord Cairns: Dixon *v.* Cal. &c., Companies, 5 *ib.* 832, 834, 835, 838, 839, *per* Lords Selborne, Blackburn, and Watson; Errington *v.* Met. R. Co., 19 Ch. D. 570, 579, *per* Jessel, M. R., Holker, L. J.; Mid. R. Co. *v.* Haunchwood, &c., Co., 20 *ib.* 556, 558, *per* Kay, J.

[2] See Mid. R. Co. *v.* Haunchwood, &c. Co., *u. s.*, 556, 557, 558, *per* Kay, J.

There would otherwise be no sense in the words "dug or carried away or used in the construction of the works."[1] In section 78 the word "minerals" is contrasted with "mines," and must therefore mean minerals other than those got from underground workings.[2] And in the same section, and in sections 79 and 85, the word "mines" is used as equivalent to "mines or minerals."[3] *Mid. Railway Co.* v. *Haunchwood, &c. Co.*[4] was decided in accordance with these conclusions. There the railway was in a cutting going through a bed of clay. The clay was not expressly purchased, and was got entirely by open workings. The defendants, who claimed under the vendors to the plaintiffs, gave notice of their intention to work. It was held, that the clay was excepted out of the conveyance to the plaintiffs, and that the plaintiffs were not, without making compensation to the defendants, entitled to an injunction to restrain them from working it. This was, in effect, a decision, that in the sections in question the word "mines" includes quarries as well as mines strictly so called. There are sections in the Wat. Cl. Act[5] to a similar effect.

Midland Railway Co. *v.* Haunchwood, &c. Co.

Exception under Wat. Cl. Act.

(γ) *Containing Chamber.*

The word "mine" does not necessarily mean a cubical layer of earth, during and so long only as it contains minerals. The word is generally wide enough, if not in its primary sense, at all events according to the meaning given to it by the authorities, to include the space which is created according as the minerals are being worked, and the vacuum which is left after they have been worked out. In other words, a person who has

Containing chamber—mine.

[1] See Mid. R. Co. *v.* Haunchwood, &c.. Co., 20 Ch. D. 555, 556, *per* Kay, J.

[2] See, as to the meaning of minerals, *infra*, Sect. 2 (a).

[3] See Mid. R. Co. *v.* Haunchwood, &c., Co., *u. s.*, 557, *per* Kay, J.

[4] 20 Ch. D. 552: following the dicta of Lords Chelmsford and Cranworth in G. W. R. Co. *v.* Bennett, L. R. 2 H. L. 38, 40; and the Scotch decisions, under the coresponding Scotch Act (8 & 9 Vict. c. 33) of Jamieson *v.* North Brit. R. Co., 6 Scot. L. R. 188; and Dixon *v.* Cal., &c., Companies, 5 App. Cas. 820 (see pp. 823, 824).

[5] 10 & 11 Vict. c. 17, ss. 18 and 22 to 27 inclusive. The Act also provides that a map or plan of underground works of the companies shall be made, and copies deposited with the Clerk of the Peace of the county in which the works are situated, to be open to the inspection of persons interested. See ss. 19, 20, 21.

an interest in a mine has, as such, *primâ facie*, an interest in the chamber which contains the minerals: and his interest in that chamber is precisely the same when it is in its natural state and filled with minerals; or when its natural state is altered by workings, and it consists partly or wholly of empty space.[1] It has accordingly been laid down, that, where the freeholder of land grants it, excepting the mines, he must be taken to except, *primâ facie*, the actual case in which the minerals are inclosed.[2] That case is, by the exception and without more, altogether out of the grant, and within the exception. The land is, in fact, severed in parallel cubical layers.[3] The grantee gets the layers containing the land above, the land below, and the land on either side, of the mines; but he gets no more. The grantor gets, or rather never parts with, the layer containing the mines.[4] And no extent of working by the grantor can transfer to the grantee the space or shell which may be created; or any interest therein, proprietary or possessory.[5] And the same principle applies where the freeholder of land grants it by way of lease, excepting the mines;[6] or where he grants the mines in fee simple, and excepts the surface;[7] or apparently where he grants the mines by way of lease, and excepts the surface;[8] or where an Act of Parliament severs the ownership of surface and mines,

[1] The definitions of "mine," given in Johnson's Dictionary and Wharton's Law Lexicon (*ante*, p. 1), are consistent with this result.

[2] See Bowser *v.* Maclean, 2 De G. F. & J. 420; Proud *v.* Bates, 34 L. J. Ch. 411; Hamilton *v.* Graham, L. R. 2 Sc. & D. 166, 168; Eardley *v.* Granville, 3 Ch. D. 835; Ramsay *v.* Blair, 1 App. Cas. 705; Atkinson *v.* King, 2 L. R. (Ir.) 339.

[3] See Eardley *v.* Granville, 3 Ch. D. 834, *per* Jessel, M. R.

[4] Bowser *v.* Maclean, 2 De G. F. & J. 420. See Proud *v.* Bates, 34 L. J. Ch. 411; Hamilton *v.* Graham, L. R. 2 Sc. & D. 166; Ballacorkish, &c., Co. *v.* Harrison, L. R. 5 P. C. 62; Eardley *v.* Granville, *u. s.*, 834; Ramsay *v.* Blair, 1 App. Cas. 701, 704; Atkinson *v.* King, 2 L. R. (Ir.) 339.

[5] See *ib.* In Hamilton *v.* Graham, *u. s.*, Lord Chelmsford dissented from the view of the majority of the Lords, consisting of Lords Hatherley, Westbury, and Colonsay. It may also be observed, that Lord Colonsay himself appears (p. 182) to have felt a doubt upon the correctness of the specific proposition stated in the text. But the doubt is hardly consistent with the other parts of his own judgment, and is certainly not consistent with the other cases cited in n. [4].

[6] See Proud *v.* Bates, 34 L. J. Ch. 406, 411; Hamilton *v.* Graham, L. R. 2 Sc. & D. 166.

[7] See Ramsay *v.* Blair, 1 App. Cas. 701.

[8] See further, on this point, *post*, p. 33; and Chap. XI., Sect. 4 (*a*).

and gives the fee simple of the surface to one man, and the fee simple of the mines to another.[1]

Containing chamber—vein, seam, and quarry.

There does not appear to be any reason why the proper senses of the words vein and seam should not, in these respects, be as extensive as that of mine. Indeed the word vein, implying, as it does, the notion of tubularity, is probably as extensive in its primary sense. And there does not appear to be any reason why a similarly extensive meaning should not, in its proper sense, belong to the word quarry.

Exception and reservation.

Consistently with its meaning as above stated, a mine or quarry is properly the subject-matter of an exception, and is not properly the subject-matter of a reservation. An exception is part of the thing granted. A reservation issues out of the thing granted, such as a rent. And where a mine or quarry purports to be reserved, it is, in fact, excepted.[2]

SECT. 2.—MINERAL.

(a) *Primâ facie Sense.*

Definitions of mineral.

"Mineral" in Johnson's Dictionary is defined as "fossile body; matter dug out of mines;" and in Jacob's Law Dictionary as "anything that grows in mines and contains metals." In fact, primarily, mineral means the thing which grows in a mine;[3] and its frequent sense requires that thing to be metal-

[1] See Ballacorkish, &c., Co. v. Harrison, L. R. 5 P. C. 49.

[2] See Cardigan *v.* Armitage, 2 B. & C. 197, 207; Fancy *v.* Scott, 2 M. & Ry. 335; Doe *v.* Lock, 2 A. & E. 705; Wickham *v.* Hawker, 7 M. & W. 63; Durham, &c., Co. *v.* Walker, 2 Q. B. 940; McDonnell *v.* McKinty, 10 Ir. L. R. 525; Proud *v.* Bates, 34 L. J. Ch. 406; Hamilton *v.* Graham, L. R. 2 Sc. & D. 168; Antrim *v.* Gray, 9 Ir. Rep. Eq. 520; Eardley *v.* Granville, 3 Ch. D. 834. An exception is necessarily in favour of the person who conveys; but there may be a re-grant to a third person by a person in whom the property is once vested: see Denison *v.* Holliday, 1 H. & N. 647. In many Acts of Parliament "mine" is expressly defined: see *e.g.*, 6 & 7 Will. 4, c. 106, s. 44; 18 & 19 Vict. c. 32, s. 2; 21 & 22 Vict. c. 109, s. 8; 35 & 36 Vict. c. 76, s. 72; 35 & 36 Vict. c. 77, s. 41; 37 & 38 Vict. c. 54, s. 7; 45 & 46 Vict. c. 38, s. 2. "Quarry" is defined in 41 & 42 Vict. c. 16, 4th sch., part 2. These definitions will be mentioned in their proper places.

[3] See Proud *v.* Bates, 34 L. J. Ch. 411; Bell *v.* Wilson, 2 Dr. & Sm. 399; Ballacorkish, &c., Co. *v.* Harrison, L. R. 5 P. C. 62; Eardley *v.* Granville, 3 Ch. D. 834, 835.

liferous.[1] And, in strictness, there does not seem any good reason why the word should, *primâ facie*, include any article which is not obtained from the earth by underground workings.[2] The authorities, however, show that, *primâ facie*, the word mineral must be taken to have a more extensive meaning than its etymology would seem to justify. It has, in fact, been laid down that mineral will, *primâ facie*, include every substance which can be got from underneath the surface of the earth for the purpose of profit.[3] And this is apparently the strict scientific meaning of the word.[4] Mineral will, therefore, *primâ facie*, include not merely such articles as coal and ironstone and freestone,[5] but fire clay and china clay or porcelain clay,[6] and also every kind of stone, flint, marble, slate, brick earth, chalk, gravel, and sand:[7] provided only that these articles are under the surface, and do not lie loosely upon it. And, in this respect, it is immaterial, that the article in question is usually worked, or can only be profitably worked, by open quarrying.[8] Coprolites also, although they are generally sup-

[1] See Rosse *v.* Wainman, 14 M. & W. 872; Darvill *v.* Roper, 3 Dr. 299; Listowel *v.* Gibbings, 9 Ir. C. L. Rep. 233. Mineral means *primâ facie* metallic mineral when used in the Act, 18 & 19 Vict. c. 32: see s. 2. But in 26 & 27 Vict. c. 49, mineral includes non-metallic mineral: see s. 37.

[2] See *ante*, p. 4.

[3] See M. R. Co. *v.* Checkley, 4 Eq. 25, *per* Lord Romilly; Hext *v.* Gill, 7 Ch. 712, *per* Mellish, L. J.; Gowan *v.* Christie, L. R. 2 Sc. & D. 277, *per* Lord Selborne; A.-G. *v.* Tomline, 5 Ch. D. 762; Mid. R. Co. *v.* Haunchwood, &c., Co., 20 *ib.* 555; Tucker *v.* Linger, 21 *ib.* 25, 35, 36; Loosemore *v.* Tiverton, &c., R. Co., 22 *ib.* 42, 43.

[4] See Darvill *v.* Roper, 3 Dr. 299.

[5] Bell *v.* Wilson, 1 Ch. 307; Mawson *v.* Fletcher, 6 *ib.* 91–93, 94; Mid. R. Co. *v.* Haunchwood, &c., Co., *u. s.*

[6] Salisbury *v.* Gladstone, 6 H. & N. 127; M. R. Co. *v.* Checkley, *u. s.*; Hext *v.* Gill, *u. s.*; A.-G. *v.* Mylchreest, 4 App. Cas. 305; Errington *v.* Met. R. Co., 19 Ch. D. 571, 578; Mid. R. Co. *v.* Haunchwood, &c., Co., *u. s.* In Met. R. Co. and Cotton's Trustees (45 L. T. 103), Jessel, M. R., is reported to have said, "It has never been held that London clay is a mineral," p. 104. But the inference suggested by this observation would not be consistent with what his lordship said in the subsequent stage of the same litigation, nom. Errington *v.* Met. R. Co., *u. s.*

[7] See Cowley *v.* Wellesley, 1 Eq. 659, 35 Beav. 639; M. R. Co. *v.* Checkley, 4 Eq. 25; A.-G. *v.* Mylchreest, 4 App. Cas. 305; Errington *v.* Met. Ry. Co., 19 Ch. D. 571; Mid. Ry. Co. *v.* Haunchwood, &c., Co., 20 *ib.* 555; Tucker *v.* Linger, 21 *ib.* 27, 36, 38, 39; Loosemore *v.* Tiverton, &c. Ry. Co., 22 *ib.* 42, 43: see also Church *v.* Incl. Comm., 11 C. B. N. S. 680, 681. According to the report of Brown's Trusts in 11 W. R. 19, limestone seems to have been there held not to be a mineral, *sed qu.*

[8] See Bell *v.* Wilson, 1 Ch. 303, 308; Hext *v.* Gill, 7 Ch. 699, 713; Errington *v.* Met. Ry. Co., *u. s.* 571; Mid. Ry. Co. *v.* Haunchwood, &c. Co., *u. s.*

posed to be merely the fossilized dung of animals, have been held[1] to be minerals; and have been recognized as such in at least one Act of Parliament.[2] And where in a grant or exception the words "mines and minerals" are used, the word "mines" will not, *primâ facie*, be held to be the governing word; so as to restrict the meaning which would otherwise be attached to the word "minerals."[3] And in cases where it is impossible to get, or where it will not pay to get, a mineral otherwise than by quarrying it, the circumstance that the person claiming to be entitled to it is not entitled to get it by quarrying, is not of itself sufficient to restrict the meaning of the word "mineral."[4] Nor will the proper meaning of the word be restricted by mere evidence, that in the vernacular of the mining or commercial world at the date of the instrument in which the word is used the particular substance in question would not have been included.[5] It has been intimated, that there will be a greater reluctance to construe the word minerals in a limited sense in cases where it is followed in the instrument in question by the words "within and under" than in cases where it is followed by the word "under" alone.[6]

Not easily restricted.

Many of the foregoing propositions are well illustrated in *Bell* v. *Wilson*.[7] There an indenture of release upon an ordinary sale contained the following exception:—"all mines and seams of coal and other mines, metals, or minerals, as well opened as not opened, within and under the said closes or parcels of ground hereby granted and released." Underneath the surface of the closes which were granted were two large beds of freestone; and the defendant claimed the right to work this freestone as being included in the exception, and proceeded to work it by open

Bell *v.* Wilson.

[1] See A.-G. *v.* Tomline, 5 Ch. D. 750. Cf. Dant *v.* Moore, 9 L. T. N. S., 381, where coprolites were held not to be "stone" within the meaning of a Navigation Act.

[2] See 41 Vict. c. 16, sch. 4, part 2 (Factories). Mineral does not appear to include anything which is in effect part of the surface: see *infra*, Sect. 3 (α).

[3] See Bell *v.* Wilson, *u. s.*, and cf. the decision below, 2 Dr. & Sm. 402: see also Hext *v.* Gill, 7 Ch. 712; and cf. Mid. Ry. Co. *v.* Haunchwood, &c., Co., 20 Ch. D. 552, *ante*, p. 9.

[4] Bell *v.* Wilson, *u. s.*; Hext *v.* Gill, *u. s.*: cf. Mid. Ry. Co. *v.* Haunchwood, &c., Co., *u. s.*: see pp. 550, 551.

[5] See Hext *v.* Gill, 7 Ch. 719.

[6] See M. R. Co. *v.* Checkley, 4 Eq. 25, *per* Lord Romilly; Hext *v.* Gill, 7 Ch. 705 n., *per* Wickens, V.C.

[7] 1 Ch. 303.

quarrying. It was in evidence that in Northumberland, the county in which the property was situated, freestone was never known to be got by mining operations as distinguished from quarrying; and it was admitted that it would not pay to get the freestone otherwise than by quarrying it. It was held, that the defendants were not entitled to work by open quarrying.[1] But it was also held, that the freestone was included in the word minerals.[2] So in *Hext* v. *Gill*.[3] There the lord of a manor granted the freehold in a copyhold tenement to the copyholder, excepting "all mines and minerals within and under the premises," &c. Under the tenement was a bed of china clay. No china clay had ever been gotten out of the manor prior to the date of the grant, and it did not appear that its existence had at the date of the grant been contemplated by either party. It was shown that the clay could not be got otherwise than by quarrying it. It was held, that the defendants were not entitled to work by quarrying.[4] But it was also held, that the clay was included in the exception.

Hext *v.* Gill.

"Mines and minerals" in Inclosure Acts.

A fortiori the proper meaning of the word minerals will not usually be restricted, where, upon an allotment to commoners, under an Inclosure Act, of the waste lands of a manor, the "mines and minerals" within or under the waste lands are reserved to the lord. Thus in *Rosse* v. *Wainman*,[5] certain waste lands in a manor were by an Inclosure Act taken away from the lords and allotted to commoners; reserving nevertheless to the lords, "all mines and minerals of what nature or kind soever lying and being within or under the said commons and waste grounds in as full, ample, and beneficial a manner to all intents and purposes as they could or might respectively have held or enjoyed the same in case the said Act had not been made; and giving to the lords full powers of working "the said mines and minerals, and carrying away the lead ore, lead, coals, ironstone, and fossils to be gotten thereout;" provided that the lords should keep the first stratum of earth "separate and not mix" it "with the lower strata." It was held, that, notwithstanding the use of the word fossils,[6] the lord was entitled to stone

Rosse *v.* Wainman.

[1] See *post*, Chap. XIV., Sect. 3, *c.* (*a*).
[2] Reversing S.C. in 2 Dr. & Sm. 395.
[3] 7 Ch. 699.
[4] See *post*, Chap XIV., Sect. 3, *c.* (*a*).
[5] 14 M. & W. 859: affirmed nom. Wainman *v.* Rosse, 2 Exch. 800.
[6] See *infra* (*δ*).

raised by means of open quarrying from one of the allotments. It was in this case clear, that the object of the Act was to give the surface for cultivation to the commoners, and to leave in the lord what it did not take away for that purpose. So in *Micklethwaite* v. *Winter*.[1] There an Act for inclosing the waste lands of a manor reserved the "coals and other minerals" to the lord.[2] The defendant, who claimed title through one of the allottees, opened a quarry under his allotment, and dug a considerable quantity of stones thereout. It was held, that "minerals" included the stones which had been so dug; and that the plaintiff, who was the lord of the manor, was therefore entitled to damages for the digging.[3]

Micklethwaite v. Winter.

(β) *Restriction of primâ facie Sense.*

However, in all cases the *primâ facie* meaning of the word minerals will yield to the intention of the parties, where, from the language of the instrument in question, such intention is made reasonably clear.[4] For example, language may be used before the word "minerals," or before the words "mines and minerals," which may furnish an argument for restricting such word or words to things *ejusdem generis*.[5] So, the use after the words "mines and minerals," of such words as "quarries and delfs of slagg, slate, or stone,"[6] or "sand, quarries of stone, brick earth, and gravel pits,"[7] or other words specifying particular kinds of minerals, may show an intention to use the word minerals in a restricted sense. So where effect cannot be given to a particular clause of an instrument without destroying a previous clause, an intention may be considered to be shown, that such particular clause should have a narrower meaning than it would otherwise have.[8]

Restriction of *primâ facie* sense.

Language of instrument.

In like manner, the particular circumstances, under which an instrument of severance takes effect, may show an intention

Circumstances of severance.

[1] 6 Exch. 644.

[2] See *post*, Chap. X., b. (a).

[3] Cf. Hext *v.* Gill, 7 Ch. 712, 713.

[4] See Mid. Ry. Co. *v.* Haunchwood, &c., Co., 20 Ch. D. 555; Loosemore *v.* Tiverton, &c., Ry. Co., 22 *ib.* 42.

[5] See Hext *v.* Gill, 7 Ch. 713.

[6] See A.-G. *v.* Mylchreest, 4 App. Cas. 294, 307, 308.

[7] See Tucker *v.* Linger, 21 Ch. D. 26, *per* Kay, J.; 35, 36, *per* Jessel, M. R.: see, however, *ib.* 38, 39, 40, *per* Cotton and Lindley, L JJ.

[8] See Bell *v.* Wilson, 1 Ch. 308.

to restrict the *primâ facie* meaning of "minerals." Thus, in *Darvill* v. *Roper*,[1] two persons, Mr. Boscawen and Lady Dacre, entitled in equal moieties to certain estates, agreed to partition them, and, for that purpose, to abide by a valuation to be made of them; "the mines of lead and coal and other mines or minerals only excepted." The valuation was accordingly made; and one moiety of the estates was conveyed to Mr. Boscawen and the other moiety to Lady Dacre, each excepting "the mines of lead and coal and other mines or minerals;" and one of the deeds in question provided that the profits of the "mines" excepted from the valuation should be taken between the parties according to their several estates and rights. That portion of the estates which was allotted to Lady Dacre contained limestone rock. At the date of the partition this rock was being worked, but was of small value. Subsequently to the partition it was extensively worked, and its sale yielded a large profit. The rock so worked was worked by open quarries. A bill was filed by Mr. Boscawen's representatives against Lady Dacre's representatives to obtain payment of a portion of the proceeds. It was held, that the limestone was not within the exception, and the bill was accordingly dismissed. So in *Brown* v. *Chadwick*.[2] There a lease contained the following exception:—"excepting and reserving unto the lessor all mines, minerals, and other royalties whatsoever, with liberty to search for, dig, raise, manufacture on the premises, and carry away the same." This exception was held not to include limestone rock which was worked by means of open quarries at the date of the lease.[3] In *Darvill* v. *Roper* the intention of the parties to limit the meaning of the word "minerals" was perhaps apparent from the language of the deed dealing with the profits of the excepted mines. Moreover, the stone in question was in the course of being worked at the date of the partition. And, in addition, it was evidently the object of the parties to divide all that without extreme difficulty or expense it was possible to divide. It must, therefore, have been the intention to include in the division

Darvill *v.* Roper.

Brown *v.* Chadwick.

[1] 3 Drew. 294.

[2] 7 Ir. C. L. Rep. 101.

[3] See also Listowel *v.* Gibbings, 9 Ir. C. L. Rep. 223.

everything that was apparent or could be easily made apparent on or near the surface.[1] In *Brown* v. *Chadwick* the limestone rock was being worked by means of open quarries at the date of the lease.

A limited construction was also adopted in *A.-G.* v. *Mylchreest*,[2] where a contest arose between the Crown and the owners of customary tenements in the Isle of Man as to the title to the clay and sand in the tenements. The Act of Settlement of the Isle "saved" to the predecessors in title of the Crown all "mines and minerals of what kind and nature soever, quarries and delfs of slagg, slate, or stone." The Act had been passed for the purpose of declaring and confirming to the tenants their ancient customary estates; and an immemorial custom for the customary tenants to take the clay and sand was shown to exist. It was held, that the saving clause did not comprise the clay and sand. So in *Tucker* v. *Linger*.[3] There it was shown[4] to be the custom of the district in question for an agricultural tenant to remove the flints which were turned up in the ordinary course of ploughing, and to sell them for his own benefit. A farming lease provided that the lessee should not commit waste nor use the land for other than agricultural purposes, and it excepted "all mines and minerals, sand, quarries of stone, brick earth, and gravel pits." It was held, that "minerals" did not include the flints to which the custom applied, although it might include flints not got according to the custom.[5]

A.-G. *v.* Mylchreest.

Tucker *v.* Linger.

And a limited construction may also, in doubtful cases, be put upon the word "minerals," where the custom of the country has adopted such construction;[6] or where continuous subsequent usage can be referred to, and is inconsistent with any other construction.[7]

Custom or usage.

[1] See, however, the observations on Darvill *v.* Roper of Jessel, M. R., in Tucker *v.* Linger, 21 Ch. D. 32.

[2] 4 App. Cas. 294.

[3] 21 Ch. D. 18.

[4] Cotton. L. J., doubted (see pp. 37, 38) whether the custom had been proved.

[5] It is understood, that this case is now under appeal to the House of Lords.

[6] See Darvill *v.* Roper, 3 Drew. 301; Bell *v.* Wilson, 2 Dr. & Sm. 395, 402, on appeal, 1 Ch. 303; Hext *v.* Gill, 7 Ch. 705 n.; Tucker *v.* Linger, 21 Ch. D. 36, 37.

[7] A.-G. *v.* Mylchreest, 4 App. Cas. 305, 308.

(γ) *Containing Chamber.*

Containing chamber.

A mere grant or exception of "minerals" will not comprise the chamber which incloses them. No doubt, according to the authorities, "mineral" cannot be confined in its meaning to the product of a mine:[1] but its meaning has never been so extended as to include anything more than what is merely the product of the earth. Where, therefore, the freeholder of land grants it, excepting the minerals thereunder, and not excepting anything further, the chamber containing the minerals is comprised in the grant, and not in the exception; and the grantor has no interest whatever in the space or shell which his working creates.[2] However, an exception in such words as "all and sundry the coal and limestone" is equivalent to mines of coal and mines or quarries of stone;[3] and an exception in such words as "the whole coal stone quarries and all other metals and minerals within" means the whole of the land under the surface.[4]

(δ) *Particular kinds of Minerals.*

Particular kinds of minerals—metal.

"Metal" is a word of less extensive meaning than "mineral." "All metals are minerals, but all minerals are not metals."[5] "We understand by the term metal a firm, heavy, and hard substance, opake, fusible by fire, and concreting again when cold into a solid body, such as it was before, which is malleable under the hammer, and is of a bright glossy and glittering substance where newly cut or broken."[6] The word "stones" hardly

Stones.

[1] See *ante*, p. 12.

[2] See Ramsay *v.* Blair, 1 App. Cas. 702, 704, 706; Metrop., &c., R. Co. *v.* Cosh, 13 Ch. D. 614, *per* Jessel, M. R. The latter is a dictum as to s. 77 of Rail. Cl. Cons. Act, 1845; under which, however, mines, and not merely minerals, are deemed to be excepted: see the section cited *ante*, p. 5, n. [13]. See also, Ballacorkish, &c., Co. *v.* Harrison, L. R. 5 P. C. 62; Eardley *v.* Granville, 3 Ch. D. 834, 835; cf. the meaning of mine, *ante*, pp. 9, 10, 11.

[3] See Hamilton *v.* Graham, L. R. 2 Sc. & D. 166.

[4] See Ramsay *v.* Blair, 1 App. Cas. 703. "Mineral" is expressly defined in the following Acts:—18 & 19 Vict. c. 32, s. 2; 21 & 22 Vict. c. 109, s. 8; 26 & 27 Vict. c. 49, s. 37; 45 & 46 Vict. c. 38, s. 2. These definitions are mentioned in their proper places.

[5] See the definition of "mineral" in Johnson's Dictionary. See Rosse *v.* Wainman, 14 M. & W. 872.

[6] Johnson's Dictionary. The deri-

seems to require a definition. It may, however, be mentioned that difficulties have sometimes arisen under Acts of Parliament as to its meaning. Where a Navigation Act imposed a toll on "every ton of butter or other goods, wares, merchandize, and commodities," and a lower toll on "every ton of coals, cinders, lime and limestone, stone, gravel and manure;" it was held, that blocks cut with wedges from a quarry, and then reduced to certain dimensions according to order, and squared with a pick-axe, to be used as railway sleepers, were liable as "stones" only, and not as "merchandize;" although each block was, after such preparation, worth 9*d.* more than unwrought stone of the same weight.[1] But, where a Navigation Act gave a toll of 1*d.* per ton on "coals, culm, coke, charcoal, or other fuel, road materials, stone, pebbles, sand, clay, manure, limestone," and a toll of 3*d.* on other "goods, wares, or merchandize," not before mentioned; it was held that coprolites were not "stone," but were "goods, wares, or merchandize."[2] The word "fossils" may, in a strict sense, apply to stones dug or quarried. Usually, however, it appears to apply only to metallic minerals.[3] The expression "produce" of mines or minerals does not necessarily mean produce in its native state. Coke may be such produce, although by combustion its chemical nature is changed.[4]

Fossils.

"Produce" of mines.

SECT. 3.—SURFACE, SUBSOIL, LAND, CLOSE, TENEMENT, HEREDITAMENT, SOIL.

(*a*) *Surface.*

"Surface," or superficies, *primâ facie,* means, of course, nothing more than the mere *vestimenta terræ.* No portion, therefore, of the actual surface of the earth will be included in "mine," "quarry," or "minerals."[5] And if the article in question

Surface.

vation of the word from μετὰ τὰ ἄλλα is sanctioned by the Encyclopædia Metropolitana.

[1] Fisher *v.* Lee, 12 A. & E. 622.

[2] Dant *v.* Moore, 9 L. T. N. S. 381.

[3] See Rosse *v.* Wainman, 14 M. & W. 872, 873.

[4] See Bowes *v.* Ravensworth, 15 C. B. 518, 523.

[5] See Mid. R. Co. *v.* Haunchwood, &c., Co., 20 Ch. D. 555, *per* Kay, J. In Bell *v.* Wilson (2 Dr. & Sm. 399), V.-C. Kindersley said that mineral would include the mould or loam

in effect, although not actually, consists of the surface of the earth, it will not be included in any of those words. It has accordingly been decided, that an exception under an Inclosure Act in favour of the owner of land of "all mines, minerals, stone, and other substrata," with a right to enter the said lands "for the purpose of opening such mines, &c.," will not include brick earth, which forms part of, or by lying close thereto in effect forms part of, the surface.[1] However, as opposed to an underlying mine, "surface" may be used in a secondary sense, to denote the whole of the soil lying over such mine, whether such soil itself contains minerals or not.[2]

(β) *Subsoil.*

Subsoil.

"Subsoil" includes, *primâ facie*, all that is below the actual surface down to the centre of the earth.[3] It is, therefore, a wider term than "mines" or "quarries," or even than "minerals."[4] And an exception of "coals and coal mines" will only comprise that portion of the subsoil which actually consists of mines of coal, and will not comprise any intervening or other strata.[5]

(γ) *Land, Close, Tenement, Hereditament.*

Land—Close—Tenement—Hereditament.

"Land" or "lands" will, *primâ facie*, include mines[6] and quarries.[7] But it is doubtful whether a coal mine is "land"

which lies more immediately at the surface, and on which the verdure grows and thrives. But qu., if, with such an extensive meaning as this a grant would not be altogether destroyed by an exception: see Bell *v.* Wilson, 1 Ch. 308.

[1] See Church *v.* Incl. Comms., 11 C. B. N. S. 664.

[2] See Humphreys *v.* Brogden, 12 Q. B. 742. Where a "street" becomes vested in an urban authority under the Pub. Health Act, 1875, they do not acquire the ownership of the mines: see Coverdale *v.* Charlton, 4 Q. B. D. 116, 121; Rolls *v.* St. George, 14 Ch. D. 796; 41 & 42 Vict. c. 77, s. 27.

[3] See Cox *v.* Glue, 5 C. B. 549.

[4] See Atkinson *v.* King, 2 L. R. (Ir.) 339: see *ante*, p. 12.

[5] See Ramsay *v.* Blair, 1 App. Cas. 704.

[6] Shep. Touch. 90; Newcomen *v.* Coulson, 5 Ch. D. 142, 143; Smith *v.* G. W. R. Co., 3 App. Cas. 165, 180; *Re* Metrop., &c., R. Co. and Cosh, 13 Ch. D. 612; Errington *v.* Metrop. R. Co., 19 *ib.* 568, 569, 570, 573, 575, 578.

[7] See McDonnell *v.* McKinty, 10 Ir. L. R. 514, 521, 524.

within the Pauper Settlement Act, 6 Geo. 4, c. 57; so as to enable an occupation of it to confer a settlement.[1] "Close" is a word sufficiently wide to include both the surface and the subsoil.[2] So "tenement" or "hereditament" includes "mines."[3]

(δ) *Soil.*

Soil.

"Soil," *primâ facie,* includes the surface and all that is below it down to the centre of the earth.[4] Thus in *Townley* v. *Gibson,*[5] an Inclosure Act directed an allotment of part of the lands in question to be made to the lady of the manor "in lieu of and as a compensation for her right and interest in and to the soil of the residue of the said common and waste grounds," and the residue to be allotted to the several tenants in fee, discharged from all customary tenures. The Act then contained a saving clause, reserving to the lord all seignories, rents, fines, &c., and all other royalties and manerial jurisdictions whatsoever. It was held, that the mines under the allotments made to the tenants were part of the soil, and were not, therefore, reserved to the lord. And the mere circumstance, in such a case, that the mines are in lease at the time of the passing of the Act, will make no difference.[6]

Townley *v.* Gibson.

It may, however, appear from the context of the instrument, in which the word "soil" is used, that it is not intended to bear its primary signification. Thus in *Pretty* v. *Solly*[7] an Inclosure Act directed allotments for public and specified purposes, and that one-sixteenth should be allotted to the lord of the manor "in lieu of and in full compensation for his and their right and interest in and to the soil of the said waste lands," and that the remainder of the common lands should be divided amongst the commoners to be held in severalty. It was then declared, that the lord's seignorial rights were not to be prejudiced except as

Pretty *v.* Solly.

[1] See R. *v.* West Ardsley, 4 B. & S. 95.

[2] See Cox *v.* Glue, 5 C. B. 551.

[3] See Dunn *v.* Birmingham Canal Co., L. R. 8 Q. B. 47, 48; Errington *v.* Metrop. R. Co., 19 Ch. D. 568; Loosemore *v.* Tiverton, &c., R. Co., 22 Ch. D. 43.

[4] See Pretty *v.* Solly, 26 Beav. 612; Wakefield *v.* Buccleuch, 4 Eq. 624; Rolls *v.* St. George, 14 Ch. D. 796.

[5] 2 T. R. 701.

[6] See Townley *v.* Gibson, 2 T. R. 701.

[7] 26 Beav. 606.

to the soil, and that the lord might thereafter enjoy all rents, heriots, &c., "and all mines, minerals, quarries, and other royalties," as if the Act had not passed. It was held, that the word "soil" was used as distinct from "land," and as equivalent to "surface;" and that the lord was entitled under the reservation to the mines under all the lands dealt with by the Act.

Buccleuch v. Wakefield.

So in *Buccleuch* v. *Wakefield*.[1] There a local Inclosure Act directed allotments to be set out with the ground and soil thereof for specified public purposes, and authorized the sale of a sufficient portion of the wastes to pay the expenses of the inclosure. It then directed a portion of the remainder of the wastes to be allotted to the lord as a compensation for his interest in the "soil," and the residue of the wastes to be allotted amongst the commoners. The 43rd section reserved to the lord all mines and minerals under the lands thereby directed to be divided and inclosed with working powers. The General Act[2] (incorporated with, so far as not controlled by, the Local Act) enacted, that every allotment set out and sold to a purchaser to defray the expenses of a local inclosure should be absolutely discharged from all common and other rights thereon "or therein," and be vested in the purchaser in fee absolutely. It was held that what was sold to pay the expenses of the inclosure was only the surface and was subject to the reservation contained in the 43rd section.[3]

Sect. 4.—Open and New Mines and Quarries.

Open mine or quarry—generally.

To constitute an open or old mine[4] or quarry, there must have been a previous general dedication thereof by a person acting within his lawful rights, for the purpose of making a profit from the produce.[5] To enable such person to so act it is not necessary that he should be the author of the settlement in question. If, for instance, there is a settlement of land con-

[1] L. R. 4. H. L. 377.

[2] 41 Geo. 3. c. 109. s. 32.

[3] Affirming, on this point, Wakefield v. Buccleuch. 4 Eq. 613.

[4] In strictness, the word "mine," where an unopened mine is spoken of, appears to be used in a secondary sense: see *ante*, p. 2.

[5] See Coppinger v. Gubbins. 3 J. & L. 417; Elias v. Griffith, 8 Ch. D. 532, nom. Elias v. Snowdon, &c., Co., 4 App. Cas. 454.

taining unopened mines on one in tail, or for life without impeachment of waste, with remainder to another for life; and the tenant in tail or for life in possession opens and works; the remainderman will, on the death of the tenant in tail without issue and without disentailing, or on the death of the tenant for life in possession, be entitled to treat the mines as open.[1]

Sales—lease—use.

If the profit from the produce has been made by means of sales, it is clear, that the mine or quarry in question would be treated as open.[2] And where a general dedication for the purpose of profit and sale has been shown, the mine or quarry will be considered open, although no profit may, in fact, have been made.[3] If a profit has been made by means of a lease of the mine or quarry, under which the lessee has actually worked, it is also clear, that the mine or quarry would be treated as open.[4] And it should not, it is submitted, in such a case be deemed material, whether the lessor has reserved a share of the profits, or has merely reserved a dead rent.[5] It does not, however, seem to be essential, that the profit should be made by means of sales or a lease. Use is also a perception of profit. And if there has been a working and use of minerals, not limited to any special or restricted purpose, the mine or quarry in question would probably be treated as open.[6]

No actual openings—restricted openings—wrongful openings.

A mine or quarry or clay pit cannot be said to be open, if, although preparations had been made for opening it, it has never in fact been opened;[7] or, if, being the subject of a lease reserving a share of the profits,[8] or even a dead rent,[9] no actual

[1] See Clavering *v.* Clavering, Mosely, 223; 2 P. Wms. 389.

[2] See Elias *v.* Snowdon, &c., Co., 4 App. Cas. 461, *per* Lord Cairns, 465, *per* Lord Selborne. See also Coppinger *v.* Gubbins, 3 J. & L. 417, *per* Lord St. Leonards; Elias *v.* Griffith, 8 Ch. D. 532, *per* James, Cotton & Thesiger, L.JJ.

[3] Elias *v.* Griffith, 8 Ch. D. 521, 532, 533; cf. Spencer *v.* Scurr, 31 Beav. 334.

[4] See cases cited in n. [2].

[5] In Elias *v.* Snowdon, &c., Co. (4 App. Cas. 454), the reservation was of a share of the profits, and Lord Cairns in his opinion (461) laid stress upon this fact. No opinion was however intimated by any of the Lords, that the actual decision would have been different, if the reservation had been by way of dead rent. See and consider in connexion with this point, Stoughton *v.* Leigh, 1 Taunt. 402; a case of dower.

[6] Elias *v.* Snowdon, &c., Co., 4 App. Cas. 465, *per* Lord Selborne.

[7] See Viner *v.* Vaughan, 2 Beav. 469, 470.

[8] See Elias *v.* Snowdon, &c., Co., 4 App. Cas. 454, 460, 461, 465.

[9] See Elias *v.* Snowdon, &c., Co. *u. s.*; and cf. Stoughton *v.* Leigh, 1 Taunt. 402, 410.

opening has taken place thereunder. Nor can a mine or quarry be said to be open, if, although openings have taken place, they can be shown to have been purely experimental.[1] A mine or quarry cannot be said to be open, if it has merely been worked or used for the purpose of supplying fuel or the means of repair to some particular tenement, or for some other definite and restricted purpose.[2] So a coal mine cannot be said to be open on the mere ground, that a permission has been given to tenants to scrape or scour for the coal at the places where it cropped out at the surface.[3] And a gravel pit cannot be said to be open on the mere ground, that a surveyor of highways has dug and carried away gravel thereout for public purposes.[4] And the mere facts; that the surveyor was bound by statute, after taking the gravel, to slope down the ground; and was liable to penalties for not so doing; and that the owner was bound to enforce such penalties; and that these duties were neglected; will not constitute the pit an open pit.[5] A mine or quarry cannot be said to be open, if the workings in question have been wrongful.[6] *A fortiori*, if they have been workings by way of trespass by a stranger.[7]

New seam or shaft

A new seam opened in an open mine, and capable of being worked by the old shaft, is itself considered an open mine.[8] And where a mine or quarry is once open, the sinking of a new pit or shaft on the same seam or vein, or the breaking ground in a new place on the same rock, is not necessarily the opening of a new mine or a new quarry.[9] However, where a mine has been opened for the purpose of winning coal, to work a contiguous mine of lead or ironstone, by means of a new shaft, would probably be an opening of a new mine.[10]

[1] Elias *v.* Snowdon, &c., Co., 4 App. Cas. 464, 465.

[2] Elias *v.* Snowdon, &c., Co., 4 App. Cas. 459, 465.

[3] Stepney *v.* Chambers, W. N. 1866, p. 401.

[4] Huntley *v.* Russell, 13 Q. B. 572, 591. The dicta to the contrary in Ross *v.* Adcock, L. R. 3 C. P. 670, 671, cannot, it is submitted, be sustained.

[5] Huntley *v.* Russell, *u. s.*

[6] Bartlett *v.* Phillips, 4 De G. & J. 421; Ross *v.* Adcock, *u. s.*, 665; Elias *v.* Snowdon, &c., Co., 4 App. Cas. 459.

[7] Elias *v.* Snowdon, &c., Co., *u. s.*

[8] Spencer *v.* Scurr, 31 Beav. 334.

[9] See Clavering *v.* Clavering, Mosely, 223; 2 P. Wms. 388; Bagot *v.* Bagot, 32 Beav. 517; Cowley *v.* Wellesley, 1 Eq. 659, 35 Beav. 639; Elias *v.* Snowdon, &c., Co., 4 App. Cas. 454, 466. Cf. Ferrand *v.* Wilson, 15 L. J. Ch. 41, 53; S. C. 4 Ha. 388.

[10] Spencer *v.* Scurr, *u. s.*, 337. An

Dormant mine or quarry.

It would seem that a dormant or abandoned mine or quarry cannot be said to be open, where the previous working has been stopped with a view to the permanent advantage of the estate.[1] Where, however, the previous working has been stopped merely from inability to carry it on at a profit, it would seem, that the mine or quarry may be considered open.[2] "A mine not worked for twelve months or two years before he" (the tenant for life) "became possessed of the property must still be considered to be an open mine. A mine not worked for a hundred years could not, I think, be properly so treated: and my present opinion is that a mine which had not been worked for twenty or thirty years from the loss of profit attending the working of it, but which, from the rise in price of iron and coal, had become remunerative, might" be considered open.[3]

SECT. 5.—COLLIERY.

Colliery.

"Colliery" is defined in Johnson's Dictionary as "the place where coals are dug"; and Webster's and Worcester's Dictionaries contain similar definitions. Colliery is, however, a word sufficiently wide to include all contiguous and connected veins and seams of coal which are worked as one concern, without regard to the closes and pieces of ground under which they are carried.[4] Indeed it is apparently wide enough to include the engines and machinery in the "contiguous and connected veins," as well as those veins themselves. Webster in defining "colliery" refers to "coalery;" and he defines "coalery" as "a coal-mine, coal-pit, or place where coals are dug, with the engines and machinery used in discharging the water and raising the coal."

inquiry will, if necessary, be directed to ascertain the purposes for which a new pit or shaft was sunk. For the form of such inquiry, see Bagot *v.* Bagot, Set. 188.

[1] See Viner *v.* Vaughan, 2 Beav. 469, 470; Bagot *v.* Bagot, 32 Beav. 509, 517.

[2] Bagot *v.* Bagot, *u. s.*

[3] Bagot *v.* Bagot, *u. s.*, *per* Lord Romilly. Cf. Stoughton *v.* Leigh, 1 Taunt. 410; Millett *v.* Davey, 31 Beav. 470, 471, 478. An inquiry will, if necessary, be directed to ascertain the time during which, and the circumstances under which, a mine remained unworked. For the form of such inquiry, see Bagot *v.* Bagot, Seton, 187, 188.

[4] See Hodgson *v.* Field, 7 East, 620.

CHAPTER II.

PROPERTY AND POSSESSION.

Sect. 1.—PROPERTY—GENERALLY.

Surface owner in general presumptively entitled to everything beneath.

Primâ facie, the owner of the surface, wheresoever situate in England or Wales, is entitled, *ex jure naturæ*, to everything beneath or within it, down to the centre of the earth, except mines of gold and silver.[1] And the principle of this rule of law applies, although the surface may have been acquired by prescription.[2] And where the residue of a long term is enlarged into a fee simple under the Act 44 & 45 Vict. c. 41, s. 65, the fee simple includes the fee simple in all mines and minerals, which at the time of enlargement have not been severed in right or in fact, or have not been severed or reserved by an Inclosure Act or award; whether the term was originally created without impeachment of waste or not.[3] It cannot, however, be said, that, if a person is shown to be the owner of mines, his ownership of the surface is to be presumed.[4] A statement by the predecessor in title of a person who claims minerals, that the

[1] Case of Mines, Plowd. 336; Hodgkinson *v.* Fletcher, 3 Dougl. 33, 34; Curtis *v.* Daniel, 10 East, 274; Barnes *v.* Mawson, 1 M. & S. 84; Lewis *v.* Branthwaite, 2 B. & Ad. 443; R. *v.* Pitt, 5 B. & Ad. 571; Rowe *v.* Grenfel, Ry. & M. 398; Rowe *v.* Brenton, Conc. 315; Harris *v.* Ryding, 5 M. & W. 72; Acton *v.* Blundell, 12 *ib.* 354; Rogers *v.* Brenton, 10 Q. B. 49, 50; Cox *v.* Glue, 5 C. B. 548; Keyse *v.* Powell, 2 E. & B. 144; Smith *v.* Lloyd, 9 Exch. 574; Rowbotham *v.* Wilson, 8 H. L. C. 360; Bowser *v.* Maclean, 2 De G. F. & J. 419; Marshall *v.* Ulleswater Co., 3 B. & S. 748; Wakefield *v.* Buccleuch, 4 Eq. 624; Smith *v.* Darby, L. R. 7 Q. B. 722; Seddon *v.* Smith, 36 L. T. N. S. 169; Newcomen *v.* Coulson, 5 Ch. D. 142, 143; Taylor *v.* St. Helen's 6 Ch. D. 274, 277; Atkinson *v.* King, 2 L. R. (Ir.) 339; Egremont Burial Board *v.* Egremont, &c., Co., 14 Ch. D. 160. As to mines of gold and silver, see *infra*, p. 40.

[2] Seddon *v.* Smith, *u. s.*: cf. Walker *v.* Jefferys, 1 Ha. 349.

[3] See the section. As to impeachment of waste, see *post*, Chap. III., Sect. 2. *b*.

[4] See Tyrwhitt *v.* Wynne, 2 B. & Al. 554; Marshall *v.* Ulleswater, &c., Co., 3 B. & S. 748.

overlying surface was in other hands, is admissible in evidence against him.[1]

Presumption rebuttable.

However, the right of property in the surface and in the underlying mines may be shown to be in different hands.[2] Nothing is more common than to sell or demise a piece of land, excepting the mines; or to sell or demise a piece of land, excepting the surface; and the instrument of severance may be producible. And many Acts of Parliament have been passed severing the ownership of a surface from that of the underlying mines. The presumption as to ownership may, moreover, be rebutted by evidence of long actual separate enjoyment of the surface and the mines by different owners.[3] And the separate enjoyment of the particular mines in question may be evidenced by acts of taking minerals under other lands within the same boundary; it being difficult, if not impossible, to show such acts in respect of every part.[4] In like manner the different strata of the sub-soil may be shown to be the subjects of different rights.[5] Where the surface and the underlying mines, or the different strata of the sub-soil, are differently owned, they are "separate tenements with all the incidents of separate ownership."[6] And the mines or each stratum may be held in fee simple,[7] or fee tail,[8] or otherwise as in the case of surface property.[9]

Land Transfer Act.

All land registered under the Land Transfer Act, 1875,[10] is, unless under the provisions of the Act the contrary is expressed on the register, to be deemed to be subject to all rights to mines and minerals, and rights of entry, search, and user, and other incidental rights and reservations, for the time being subsisting with reference thereto. But when it is proved to the satisfaction

[1] See Crease *v.* Barrett, 1 Cr. M. & R. 919.

[2] Rich *v.* Johnson, 2 Str. 1142 (a case of a manor and the underlying mines); Rowe *v.* Grenfel, Ry. & M. 398; Hodgkinson *v.* Fletcher, 3 Dougl. 34; Harris *v.* Ryding, 5 M. & W. 72; Cox *v.* Glue, 5 C. B. 548; Keyse *v.* Powell, 2 E. & B. 144.

[3] See Humphreys *v.* Brogden, 12 Q. B. 739: see also Rowe *v.* Grenfel, *u. s.*; Curtis *v.* Daniel, 10 East, 273; Barnes *v.* Mawson, 1 M. & S. 84; Cox *v.* Glue, *u. s.*

[4] Barnes *v.* Mawson, *u. s.*

[5] Cox *v.* Glue, 5 C. B. 549.

[6] See Rowbotham *v.* Wilson, 8 E. & B. 142, *per* Watson, B.; Hamilton *v.* Graham, L. R. 2 Se. & D. 166: see also Seaman *v.* Vawdrey, 16 Ves. 392; and cf. Guest *v.* East Dean, L. R. 7 Q. B. 337.

[7] See Stoughton *v.* Leigh, 1 Taunt. 402.

[8] See Port *v.* Turton, 2 Wils. 172.

[9] See *ib.*

[10] 38 & 39 Vict. c. 87.

of the registrar that the right to any mines or minerals is vested in the proprietor of the land registered or about to be registered, the registrar may register such proprietor as proprietor of the mines and minerals as well as of the land. And when it is proved that the right to any mines or minerals is severed from any land registered or about to be registered, the registrar may, on the application of the person entitled to any such mines and minerals, register him as the proprietor; and, upon such registration being effected, he must enter a reference thereto on the register of the land. And when the existence of rights to mines and minerals or the incidental rights is proved, the registrar may enter notice thereof on the register.[1] The registrar may register the proprietor of mines or minerals severed from the land in the same manner and with the same incidents as in the case of land, or as near thereto as circumstances admit.[2]

SECT. 2.—PROPERTY—ROADWAYS AND WATERWAYS—RIVERS—SEA AND SEA-SHORE.

(a) *Roadways generally.*

Roadways—generally.

The principle as to the presumption of ownership is not confined to cases where the surface owner is in uninterrupted or exclusive enjoyment of the surface. In the case of a highway, for example, where the public pass and repass at pleasure, the property in the subjacent mines is, *primâ facie*, in the freeholder of the adjacent soil,[3] as being the freeholder of the highway.[4] And the same presumption, which prevails in the case of a public highway, prevails in the case of a private way.[5] The soil in roads set out under an Inclosure Act, and with it

[1] S. 18.

[2] S. 82.

[3] 1 Rolle's Abr. 392, B. 1 & 2; Goodtitle *v.* Alker, 1 Burr. 143: "the king has nothing but the passage for himself and his people, but the freehold and all profits belong to the owner of the soil. So do all the trees in it and mines under it which may be extremely valuable," Goodtitle *v.* Alker, 1 Burr. 143, *per* Lord Mansfield.

[4] 2 Inst. 705; Lade *v.* Shepherd, 2 Str. 1004. Cf. the Sc. case of Waddell *v.* Buchan, 6 Sess. Cas. (3rd ser.) 690.

[5] Holmes *v.* Bellingham, 7 C. B. N. S. 329.

the mines therein, belong, *primâ facie*, to the lord of the manor, and not to the owner of the adjoining inclosure.[1]

Various Acts of Parliament relating to ways and roads contain specific provisions as to mines. Thus, the Gen. Highways Act,[2] after providing for the widening of narrow highways by purchasing ground from the adjoining owner, saves to the owner of such ground all mines, minerals, and fossils lying under the same, which can be got without breaking the surface.[3] The High. (Turnpike) Act, 3 Geo. 4, c. 126, after providing that, on the completion of a new road, the old highway is to be stopped up and the land sold, reserves all mines, minerals, and fossils lying under the old road to the persons who would have been entitled to the same if the old road had continued.[4] The High. (Turnpike) Act, 7 & 8 Geo. 4, c. 24, reserves all mines of iron, tin, lead, copper, coal, and other minerals in or under any land to be used for any turnpike road to the persons who would have been seised of or entitled to the same in case the Act for making such road had not been passed, with liberty to dig for and work the same in the manner usual in the district, without doing damage to such road or any part thereof.[5] And the High. and Locom. Am. Act, 1878,[6] reserves all mines and minerals of any description whatsoever under any disturnpiked road or highway, which has or shall become vested in any urban sanitary authority by virtue of s. 68 of the Pub. Health Act, 1848, or s. 149 of the Pub. Health Act, 1875, to the persons who would be entitled thereto in case such road or highway had not become so vested; and empowers such persons to work and get the same, as if the road or highway had not become so vested, doing no damage to the road or highway; and these provisions extend to the Isle of Wight and to South Wales.[7]

Gen. Highways Act.

Highw. (Turnpike) Acts.

Highw. and Loc. Am. Act 1878.

(β) *Railways and Waterworks.*

A railway company purchasing under the compulsory powers of the Rail. Cl. Cons. Act, 1845[8] are not entitled to any mines

Railways and waterworks.

[1] See Seddon *v.* Smith, 36 L. T. N. S. 168, 169.

[2] 5 & 6 Will. 4, c. 50.

[3] S. 82.

[4] S. 88.

[5] S. 18.

[6] 41 & 42 Vict. c. 77.

[7] S. 27. See Rolls *v.* St. George, 14 Ch. D. 794, 799; *ante*, p. 20 n. [2].

[8] 8 & 9 Vict. c. 20.

of coal, ironstone, slate, or other minerals under any land purchased by them, "except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works," unless the same shall have been expressly purchased.[1] And the Wat. Cl. Act [2] contains provisions substantially identical.[3] The words "necessary to be dug or carried away or used in the construction of the works" may entitle a company to use clay dug out of a cutting on the land of one person in order to construct an embankment on the land of another.[4] But they do not entitle a company, who carry a railway upon an embankment over the land of one person, to excavate merchantable clay from that land, and use it to puddle bridges which they are building on other land.[5]

(γ) *Rivers.*[6]

Rivers.

The right of property in mines lying beneath rivers is, *primâ facie*, determined in the same manner as in the case of ways and roads. The bed of all navigable rivers[7] up to high-water mark belonging, *primâ facie*, to the Crown,[8] the subjacent mines and quarries belong, *primâ facie*, to the Crown.[9] Where the river is not navigable, the soil *usque ad medium filum aquæ*,[10] and, accordingly, the mines lying beneath such soil, belong, *primâ facie*, to the adjoining freeholder.[11]

[1] S. 77, cited *ante*, p. 5. n. [13]. See G. W. R. Co. *v.* Bennett, L. R. 2 H. L. 38, 41 : Dixon *v.* Cal., &c., Companies, 5 App. Cas. 829. They have power to purchase : see *post*, Chap. VII. Part A. Sect. 6.

[2] 10 & 11 Vict. c. 17.

[3] Ss. 12, 18.

[4] See Loosemore *v.* Tiverton, &c., R. Co., 22 Ch. D. 33, 34, *per* Fry, J. See, however, Jamieson *v.* North Brit. R. Co., 6 Scot. L. R. 188; a decision under the Scotch Act, 8 & 9 Vict. c. 33.

[5] Loosemore *v.* Tiverton, &c., R. Co., 22 Ch. D. 25, *per* Fry, J.

[6] For a case involving the ownership of minerals deposited upon the beds of a pool by a stream which supplied it, see Thomas *v.* Jones, 1 Y. & C. C. C. 510.

[7] The flux and reflux of the tides are *primâ facie* evidence of a navigable river. Miles *v.* Rose, 5 Taunt. 705; Murphy *v.* Ryan, 2 Ir. L. R. C. P. 143.

[8] Lyon *v.* Fishmongers' Co., 1 App. Cas. 673, 682.

[9] See The Crown Lands Act, 1866, 29 & 30 Vict. c. 62, s. 21.

[10] Hale de Jure Maris, Ch. 1 ; Wishart *v.* Wyllie, 1 Macq. 389 ; Bickett *v.* Morris, L. R. 1 Sc. & Div. 47 ; Lyon *v.* Fishmongers' Co., 1 App. Cas. 682.

[11] As to rivers in Cornwall, see *infra*, Sect. 5 (γ).

(δ) *Sea and Sea-shore.*

Sea and sea-shore.

So in the case of the sea. The Crown is entitled, *primâ facie*, to the soil of the sea adjoining the coasts of the United Kingdom;[1] and, in consequence, to all the mines subjacent thereto.[2] So, generally, in the case of the sea-shore. The Crown is, in general, entitled to that part of the sea-shore, which extends from low-water mark up to the ordinary high-water mark.[3] And by ordinary high-water mark is meant the line reached by the average of medium high tides between the spring and the neap in each quarter of a lunar revolution during the whole year.[4] That part of the sea-shore, which extends from low-water mark up to ordinary high-water mark, may, however, be shown to belong to the adjoining owner.[5] That part of the sea-shore, which lies between ordinary high-water mark and the highest limit of the tide, belongs, *primâ facie*, to the adjoining owner.[6] The ownership of the sea-shore shifts to the Crown or to the adjoining owner, according as the sea encroaches or recedes by slow and insensible steps. But a rapid and perceptible alluvion belongs to the Crown.[7] And the mines beneath the sea-shore belong *primâ facie* to the adjoining owner or to the Crown according as the soil superjacent to such mines belongs to such owner or to the Crown.[8]

[1] A.-G. *v.* Chambers, A.-G. *v.* Rees, 4 De G. M. & G. 206.

[2] As to the sea near Cornwall, see *infra*, Sect. 5 (γ).

[3] Scratton *v.* Brown, 4 B. & C. 495; Lopez *v.* Andrew, 3 M. & Ry. 329 n.; Lowe *v.* Govett, 3 B. & Ad. 863; A.-G. *v.* Chambers, A.-G. *v.* Rees, 4 De G. M. & G. 206, 4 De G. & J. 55, 73.

[4] A.-G. *v.* Chambers, A.-G. *v.* Rees, 4 De G. M. & G. 206, 4 De G. & J. 73.

[5] Scratton *v.* Brown, 4 B. & C. 495; Lopez *v.* Andrew, 3 M. & Ry. 329 n.; Beaufort *v.* Swansea, 3 Exch. 413; Calmady *v.* Rowe, 6 C. B. 861; A.-G. *v.* Hanmer, 27 L. J. Ch. 837; Constable *v.* Nicholson, 14 C. B. N. S. 230.

[6] Lowe *v.* Govett, 3 B. & Ad. 869, 870, 871; A.-G. *v.* Chambers, A.-G. *v.* Rees, *u. s.*

[7] A.-G. *v.* Chambers, A.-G. *v.* Rees, 4 De G. & J. 66, *et seq.*

[8] *Ib.*, 4 De G. M. & G. 206; 4 De G. & J. 73; Lopez *v.* Andrew, *u. s.*: see A.-G. *v.* Chambers, 12 Beav. 159: R. *v.* Keyn, 2 Exch. D. 199; The Crown Lands Act, 1866, 29 & 30 Vict. c. 62, s. 21. As to the seashore in Cornwall, see *infra*, Sect. 5 (γ).

SECT. 3.—PROPERTY AND POSSESSION—REVERSIONS AND REMAINDERS—LIFE TENANCIES AND LEASEHOLDS.

Lands generally—property and possession.

Where lands are granted for life, leaving a reversion in fee simple vested in the grantor; or where lands are settled upon one for life, with remainder to another in fee simple or fee tail; the reversioner or remainderman has the general property and right of inheritance in the subsoil and in the mines or quarries which it may contain, as part of his right in respect of the entire *solum* from the surface down to the centre of the earth. But the tenant for life has the right of possession or temporary enjoyment, as part of his right in respect of the entire *solum* in like manner.[1] And the position of a tenant for years, or from year to year, or even of a tenant at will, is precisely similar in this respect to that of a tenant for life.[2] However, during the continuance of a statutory term under the Irish Act, 44 & 45 Vict. c. 47, all mines and minerals, coals and coal pits, subject to such rights in respect thereof as the tenant under the immediately preceding tenancy was entitled to exercise, are exclusively reserved to the landlord.[3] And, on the other hand, where the residue of a long term is enlarged into a fee simple under the Act 44 & 45 Vict. c. 41, s. 65, the fee simple includes the fee simple in all mines and minerals; whether the term was originally created without impeachment of waste or not.[4] Where B. became tenant from year to year of a close containing an unopened mine, and entered into occupation of the surface; and in 1821, pending the tenancy, the lessor demised the mine as a separate tenement to B. and P.; and in 1832 B.'s tenancy from year to year ceased; and no working took place until 1847; it was held, that, before 1821, B. had been in possession of the mine; that by the demise in 1821 he became

[1] See Attersoll *v.* Stevens, 1 Taunt. 188, 193; Lewis *v.* Branthwaite, 2 B. & Ad. 437, 443, 445; Keyse *v.* Powell, 2 E. & B. 144. Cf. the 5th resolution in Bowles' Case, Lead. Cas. Conv. 37; A.-G. *v.* Marlborough, 3 Madd. 538.

[2] Lewis *v.* Branthwaite, *u. s.*; Raine *v.* Alderson, 6 Scott, 698, 699; Keyse *v.* Powell, *u. s.*

[3] S. 5.

[4] See the section. As to impeachment of waste, see *post*, Chap. III., Sect. 2, *b*.

possessed without actual entry ; that such possession enured for the benefit of B. and P. ; and that, accordingly, B. and P. were both in possession from 1821, and did not hold a mere *interesse termini*.[1]

Mines or quarries—property and possession.

And the principles applicable to lands which happen to contain mines or quarries, must equally apply to mines or quarries themselves as a separate tenement. The lessee for years of a particular mine or quarry has the right of possession ; while the reversioner has the right of property. And the same principles apply to minerals, so long as they remain unsevered and part of the inheritance.[2] Nor are such principles affected even in the cases where a tenant for life or years is entitled to work them.[3] Before severance he has a power only and not an interest.[4] It follows, that even in such cases, if the tenant for life or years abstains from exercising his right, or only partially exercises it, the minerals, or such of them as remain unworked, devolve on the expiration of his interest on the reversioner or remainderman.[5]

Minerals—property and possession.

Containing chamber—property and possession.

The rights of property and possession comprise respectively rights in respect of the chamber which incloses the minerals. As soon as a space or vacuum is created by the working of the minerals, the right of property in such space or vacuum becomes vested in the reversioner or remainderman, but the right of possession becomes vested in the tenant for life or years.[6] And the principles applicable to land which happens to contain a mine or quarry must equally apply to a mine or quarry itself as a separate tenement. In the case, therefore, of a mining lease, strictly so called, as soon as the lessee by his working has created a space or vacuum, although the right of property therein becomes vested in the lessor, the right of possession becomes vested in the lessee.[7]

[1] Keyse *v.* Powell, 2 E. & B. 132, 146.

[2] See Attersoll *v.* Stevens, 1 Taunt. 193, 198, 199 ; Davis *v.* Marlborough, 2 Swanst. 147 n. : see also the 7th resolution in Bowles' Case, L. C. Conv. 37.

[3] *Ib.*, see *post*, Chap. III., Sect. 2, *a*, (α) ; *b*, (β).

[4] See Davis *v.* Marlborough, 2 Swanst. 147 n. : see also Attersoll *v.* Stevens, 1 Taunt. 193, 198, 199 ; Doe *v.* Powell, 8 Scott, N. R. 693.

[5] See and consider Cockerell *v.* Chombley, 10 B. & C. 572.

[6] See Lewis *v.* Branthwaite, 2 B. & Ad. 437 ; Keyse *v.* Powell, 2 E. & B. 144 ; in connexion with Eardley *v.* Granville, 3 Ch. D. 826.

[7] See further, on this point, *post*, Chap. XI., Sect. 4 (α).

Sect. 4.—PROPERTY AND POSSESSION—MANORIAL OR ENFRANCHISED OR INCLOSED LANDS.

(a) *Copyholds.*

Copyholds—property and possession.

The right of property in mines or quarries beneath or within the copyhold tenements of a manor is, in general, vested in the lord as having the freehold of inheritance in him.[1] But it may by immemorial custom be vested in a copyholder of inheritance; or for life, with power to renew or to nominate a successor.[2] A grant of copyholds, however, includes a grant of the subsoil, with all the mines or quarries therein contained, as part of the grant in respect of the entire solum from the surface down to the centre of the earth. The possession of mines or quarries beneath or within a copyhold tenement, and of the subsoil containing them, is, accordingly, as part of the entire solum, vested in the copyholder.[3] In fact the right of a copyholder, who has always been regarded as at least a tenant at will, cannot, in this respect, be less than the right of an ordinary tenant at will.[4] The property in the minerals (as well as the mines or

[1] Winchester *v.* Knight, 1 P. Wms. 406; Grey *v.* Northumberland, 17 Ves. 282; Bourne *v.* Taylor, 10 East, 189: Rowe *v.* Brenton, Conc. 313; 8 B. & C. 737; 3 M. & R. 133; Dearden *v.* Evans, 5 M. & W. 11; Lewis *v.* Branthwaite, 2 B. & Ad. 487; Keyse *v.* Powell, 2 E. & B. 132; Bowser *v.* Maclean, 2 De G. F. & J. 419; Hext *v.* Gill, 7 Ch. 713; Eardley *v.* Granville, 3 Ch. D. 826, 832; A.-G. *v.* Tomline, 5 Ch. D. 750, 762. Cf. Greenwich Hospital *v.* Blackett, 12 Jur. 151.

[2] See Scriv. Cop. 252; Salisbury *v.* Gladstone, 6 H. & N. 129. In the manor of Wakefield (Yorkshire) the mines and minerals belong to the copyholders: see Roe *v.* Vernon, 5 East, 62; Price *v.* Macaulay, 2 De G. M. & G. 343, 344; Dav. 2, p. 501, n. The same is apparently the case in the manor of Abercarne (Monmouth): see Keyse *v.* Powell, 2 E. & B. 132; Phillips *v.* Homfray, 6 Ch. 771: see, however, Moggridge *v.* Hall; Llanover *v.* Homfray; Phillips *v.* Llanover, 13 Ch. D. 380. As to the manor of Great Broughton, see Mawson *v.* Fletcher, 10 Eq. 212, 214, 219; 6 Ch. 91, 94.

[3] See Player *v.* Roberts, Sir W. Jones, 243; Gilb. Ten. 327; Grey *v.* Northumberland, 13 Ves. 236, 17 *ib.* 282; Bourne *v.* Taylor, 10 East, 189; Rowe *v.* Brenton, Conc. 313: Whitchurch *v.* Holworthy, 4 M. & S. 340; Lewis *v.* Branthwaite, 2 B. & Ad. 444; Keyse *v.* Powell, 2 E. & B. 132; Bowser *v.* Maclean, 2 De G. F. & J. 420; Eardley *v.* Granville, 3 Ch. D. 832; A.-G. *v.* Tomline, 5 Ch. D. 762.

[4] See Lewis *v.* Branthwaite, *u. s.*; Keyse *v.* Powell, *u. s.*: see *ante*, p. 32.

quarries) beneath or within a copyhold tenement is, in general, vested in the lord.[1]

Containing chamber — property and possession.

Upon a grant of copyholds; as upon an ordinary grant, excepting the underlying mines;[2] the grantor retains not merely the property in the underlying minerals, but the property in the chamber which incloses them. But the possession of such chamber, like the possession of the inclosed minerals, and of the subsoil generally,[3] becomes vested, *primâ facie*, in the copyholder.[4] As soon, therefore, as a space or vacuum is created by the working of manorial mines, the right of property in such space or vacuum becomes vested in the lord, but the right of possession becomes vested in the copyholder.[5]

(β) *Customary Freeholds.*

Customary freeholds — property and possession.

The right of property in mines or quarries beneath or within customary freeholds is in general vested in the lord; and the right of possession in the tenant.[6] Indeed, the fact, that a tenant has no right of property in mines or quarries is often material in showing that his holding is that of a customary, and not of an ordinary, freeholder. Thus, in an action for taking coal under a copyhold tenement, the tenants showed by old surrenders, admissions and decrees, that they were copyholders of inheritance with fines certain, holding according to the custom of husbandry of the manor, but without stating them to hold at the will of the lord. Evidence was produced on the other hand, that for more than 100 years the lord and his predecessors had leased coal under copyholds in different parts of the manor and received rents therefor, and that the lessees, and not the copyholders, had taken the coal. It was held, that this explained the nature of the tenure according to the custom of husbandry of the manor, and showed that the freehold was in the lord, and not in the tenants.[7] However, the right of pro-

[1] See Hext *v.* Gill, 7 Ch. 712: A.-G. *v.* Tomline, 5 Ch. D. 762, 768.

[2] See *ante*, p. 33.

[3] See *ante*, p. 34.

[4] Eardley *v.* Granville, 3 Ch. D. 833.

[5] See *ib.*

[6] See Winchester *v.* Knight, 1 P. Wms. 406; Portland *v.* Hill, 2 Eq. 765, 777.

[7] See Brown *v.* Rawlins, 7 East, 409.

perty in mines or quarries beneath or within customary freeholds may be shown to be vested in the tenant.[1]

(γ) *Enfranchisements.*

Enfranchisements.

Where copyhold tenements are voluntarily enfranchised, the person who obtains the enfranchisement becomes entitled, *primâ facie*, to the mines and quarries therein; the right of property in which becomes divested from the lord.[2] However, with respect to copyholds enfranchised under the Act 4 & 5 Vict. c. 35, the determination of disputes by the Copyhold Commissioners cannot, directly or indirectly, affect any right to mines and minerals; and no commutation can affect any rights of lords of manors to mines and minerals or quarries, unless expressly commuted.[3] And with respect to copyholds compulsorily enfranchised under the Act 15 & 16 Vict. c. 51, no enfranchisement can affect the rights of any lord or tenant to mines, minerals, or quarries, or to any easements or rights incident to the working thereof, unless with the express consent in writing of such lord or tenant.[4]

(δ) *Wastes.*

Wastes.

The property in all mines and quarries beneath and within the waste or common of a manor is vested, *primâ facie*, in the lord as the freeholder thereof.[5] But of course, in an action to determine the ownership of land alleged to form part of a waste, acts of ownership by the lord in respect of minerals under other parts of the waste are not receivable in evidence, until it is first shown that the land in question forms part of one entire waste to which those acts are applicable.[6] However, the right of property in mines or quarries beneath or within the waste may be shown to be vested in the tenants of the manor.[7]

[1] See Curtis *v.* Daniel, 10 *ib.* 273.

[2] See and consider Townley *v.* Gibson, 2 T. R. 701.

[3] Ss. 39, 82.

[4] S. 48.

[5] See Filewood *v.* Palmer, 5 Vin. Abr. p. 8, § 33; Mosely, 172; Melm. MSS. E. 53, Linc. Inn Library; Townley *v.* Gibson, 2 T. R. 705; Place *v.* Jackson, 4 D. & Ry. 318; Roberts *v.* Haines, 6 E. & B. 652; A.-G. *v.* Hanmer, 27 L. J. Ch. 840: cf. Hoskins *v.* Robbins, 1 Vent. 123; nom. Hopkins *v.* Robinson, 2 Lev. 2.

[6] Tyrwhitt *v.* Wynne, 2 B. & Al. 554.

[7] See Curtis *v.* Daniel, 10 East, 273.

(ε) *Inclosures.*

Inclosures. Where an inclosure takes place, the right of property in the mines and quarries within the inclosure becomes vested, *primâ facie*, in the allottees of the surface, as such allottees.[1] And if the lord, or any person claiming under him, attempts to interfere with the allottees' right, he may be restrained.[2] However, upon the occasion of an inclosure, special provisions are usually made as to the property in the mines and minerals.[3] And with respect to land inclosed under the Inclosure Acts,[4] where the right to mines and substrata exists as property distinct from property in the surface, and is not compensated upon the inclosure, the inclosure does not affect the property in such mines and substrata, or any incidental rights or easements; and where any mines or substrata, or the right of searching for or getting the same, has been leased or agreed to be leased as property distinct from the property in the surface, with or without incidental powers over the surface, the inclosure does not affect the rights of the lessee.[5] Inclosure Acts.

SECT. 5.—PROPERTY — PARTICULAR LOCALITIES.

(a) *St. Briavels—Derbyshire—Isle of Man.*

St. Briavels. The right of property in all mines and quarries (with certain few exceptions) of every description throughout the Forest of Dean and the other portions of the Hundred of St. Briavels, in the County of Gloucester, is vested in the Crown.[6] Derbyshire. The right of property in the mines and veins of lead ore in a district within the Hundred of High Peak, in the county of Derby, called the King's Field, and in certain other parts of the same Hundred; and in a district within the soke and wapentake of Wirksworth, or Low Peak, in the same county, called the

[1] See Townley *v.* Gibson, 2 T. R. 701: see p. 706; Doe *v.* Davidson, 2 M. & S. 175, 188, 190.

[2] See Ackroyd *v.* Briggs, 13 L. T. N. S. 521.

[3] See Doe *v.* Davidson, *u. s.*

[4] See *post*, Chap. VII., Part B., Sect. 2, *b.*

[5] 8 & 9 Vict. c. 118, s. 98.

[6] See the preamble of 1 & 2 Vict. c. 43; *post*, Chap. XX., *a.*

King's Field, is vested in the Crown.[1] The right of property in the mines and veins of lead ore in the manors of Ashford, Hartington, Peak Forest, Tideswell, Crich, Stoney Middleton and Eyam, Youlgrave, and Litton, in the same county, is in private hands.[2] The right of property in the mines and quarries, and in the minerals (not being clay or sand), in the customary estates of inheritance in the Isle of Man is vested in the Crown.[3]

Isle of Man.

(β) *Assessional and other Manors in Cornwall.*

Cornish manors.

The possessions of the Duchy of Cornwall, granted to the Black Prince by Edward the Third,[4] formerly consisted in part of the seventeen assessional manors of Helston-in-Trigg, Penmayne, Tintagel, Restormel, Penlyne, Penkneth, Talskedy, Liskeard, Rillaton, Stoke Climsland, Trematon, Tewington, Tybesta, Moresk, Tywarnhaile, Helston-in-Kerrier, and Calstock. But the last six of these have been sold for the redemption of land-tax; with an exception, however, of the mines and metallic minerals thereunder.[5] The lands of these seventeen manors consist, or consisted prior to the Act 7 & 8 Vict. c. 105, partly of freehold tenements, partly of conventionary tenements, and partly of wastes.[6] The right of property in the mines and minerals under the freehold tenements has always belonged to the tenants.[7] The lord of the manor of Tywarnhaile Tyas, in Cornwall, is entitled to a moiety of all tin mines, tin ore, tin dues, and tin toll under the demesne and conventionary lands of the assessional manor of Tywarnhaile; and the Duke of Cornwall is entitled to a moiety of all like mines, ore, dues, and toll under the lands within the manor

[1] See the preambles of 14 & 15 Vict. c. 94; 15 & 16 Vict. c. 163 (local); *post*, Chap. XXI., Sect. 1, *a*.

[2] See the preamble of 15 & 16 Vict. c. 163; *post*, Chap. XXI., Sect. 1, *a*.

[3] See *post*, Chap. XXI., Sect. 2 (*a*).

[4] See Rowe *v.* Brenton, Conc. Introd. IX.; Crease *v.* Barrett, 1 C. M. & R. 921; preamble of 7 & 8 Vict. c. 105.

[5] See Rowe *v.* Brenton, Conc. Introd.; preamble of 7 & 8 Vict. c. 105, and schedules thereto.

[6] *Ib.*

[7] Rowe *v.* Brenton, Conc. 315. See also Crease *v.* Barrett, *u. s.*, 922. In the latter case the ancient answers of conventionary tenants of a manor were received in evidence against the freeholders of the manor.

of Tywarnhaile Tyas; and the lord and the Duke are empowered by agreement in writing, enrolled in the duchy office, to determine all questions arising between them respecting such rights.[1] Subject to such right of the lord of the manor of Tywarnhaile Tyas, the Duke of Cornwall is entitled to all mines and metallic minerals under the conventionary or former conventionary lands of the unsold assessional manors; to all mines, minerals, stone, and substrata under the waste and other demesne lands of the same manors; to all mines and metallic minerals under the conventionary or former conventionary lands and former waste or demesne lands of the sold assessional manors; and to all mines, minerals, stone, and substrata under all other lands of the unsold manors, and all mines and metallic minerals under all other lands of the sold manors, which by the award under the Act 7 & 8 Vict. c. 105 were determined to belong to the Duke.[2]

(γ) *Sea, Sea-shore, and Rivers near or in Cornwall.*

Cornish sea, sea-shore, and river

All "mines and minerals" lying under the sea-shore between high- and low-water marks in Cornwall, and under estuaries and tidal rivers and other places (below high-water mark) even below low-water mark in Cornwall, are, as between[3] the Queen and the Duke of Cornwall, vested in the Duke in right of the Duchy.[4] But from these are excepted "mines and minerals" in land below high-water mark, which is parcel of any manor belonging to her Majesty in right of her Crown.[5] All "mines

[1] 11 & 12 Vict. c. 83, s. 2. See, before the Act, Curtis *v.* Daniel, 10 East, 273.

[2] 7 & 8 Vict. c. 105, ss. 53, 54; the schedules thereto, and the awards thereunder; 11 & 12 Vict. c. 83, s. 1. Where discrepancies exist between the schedules and maps annexed to the awards, they are to be settled by reference to the maps: 11 & 12 Vict. c. 83, s. 1. Rowe *v.* Brenton (Conc.; 8 B. & C. 737) had previously decided, that copper ore raised from mines in the conventionary tenements of one of the sold assessional manors belonged to the Crown in right of the Duchy.

[3] As to the construction to be placed on these words, see Penryn *v.* Holm, 2 Exch. D. 332.

[4] The Cornwall Sub. Mines Act, 1858, 21 & 22 Vict. c. 109, s. 1. See, as to the origin of this Act, R. *v.* Keyn, 2 Exch. D. 155, 156, 157, 199, 200, 201. The lines of high and low water marks are, if necessary, determinable by arbitration: see s. 7 of the Act.

[5] S. 1.

and minerals" below low-water mark under the open sea adjacent to, but not part of, Cornwall, are, as between the Queen and the Duke, vested in her Majesty in right of her Crown.[1]

Sect. 6.—PROPERTY IN MINES ROYAL.

Crown presumptively entitled to mines royal.

The right of property in all mines of gold and silver within the realm, whether they be in the lands of the Crown or of subjects, is vested, *primâ facie*, in the Crown, by prerogative.[2] In fact, mines of gold and silver are properly called "mines royal," and mines of all other substances "base mines." And it was formerly the law, that, if gold or silver was contained in base metal in the land of a subject, not merely the gold or silver, but such base metal also, belonged to the Crown by prerogative.[3] Now, however, no mine of copper, tin, iron, or lead, can be taken to be a royal mine, although gold or silver may be extracted thereout;[4] and the owner of every such mine may hold and work the same accordingly.[5] But the Crown, and all persons claiming any royal mines under the Crown, have the right of pre-emption of the ore of any such mine in any part of England or Wales or Berwick-on-Tweed (other than tin ore in Devon and Cornwall), at certain specified rates of payment.[6]

Presumption rebuttable.

However, the presumption that the right of property in mines royal is vested in the Crown may be rebutted by evidence of ownership in a subject. A mine royal is not an incident inseparable from the Crown, but may be severed from it by apt and precise words.[7] And if the Crown has a mine royal in the land of a subject and makes a grant of "mines" *simpliciter*, the mine royal will pass: for otherwise the grant would be without effect; the Crown, as such, not being entitled to the base mines in the land of a subject.[8] If, however, the Crown makes a

[1] S. 2. "Mines and minerals," for the above purposes, include quarries, veins, or beds of stone, and substrata of any other nature, and the ground and soil in, upon, or under which such mines and minerals, quarries, veins, or beds of stone and other substrata lie: s. 8.

[2] Case of Mines, Plowd. 236; Case of Saltpetre, 12 Rep. 12.

[3] Case of Mines, *u. s.*

[4] See 1 W. & M. c. 30, s. 3.

[5] See 5 W. & M. c. 6, s. 1.

[6] 5 W. & M. c. 6, s. 2; 55 Geo. 3, c. 134.

[7] Case of Mines, Plowd. 336.

[8] *Ib.* 337.

grant of "mines" *simpliciter* in a piece of Crown land, and there are mines royal and base mines therein, the base mines only will pass: for the common intent of the grant is thereby satisfied.[1] The principle, that a grant by the Crown of lands will not pass gold or silver mines therein, unless they are expressly granted, applies to a grant of lands in the Colonies.[2]

SECT. 7.—CONSTRUCTIVE POSSESSION.

Constructive possession.

Where the entry into possession of part of a mine or quarry is rightful or under a colour of right, the possession of the whole may be presumed.[3] And a person in actual physical possession of part of a mine or vein, who has an agreement for a lease of the whole, and who can compel the lessor to perform it, will be treated as constructively in possession of the remainder:[4] although, whether such possession will constitute a tenancy from year to year appears doubtful.[5] And acts of ownership by a wrongdoer in parts of the sub-soil of a single and undivided piece of land may be evidence, that he has taken possession of the whole.[6] In like manner rightful possession of one mine within tin-bounds is a sufficient possession of all the mines within them.[7] However, physical possession by a wrongdoer of part of a mine or vein does not create any conclusive presumption of his possession of the whole.[8] And a person alleging himself to have an agreement for a lease of the whole, if he cannot compel his lessor to perform it, is in the same position as a wrongdoer.[9] And mere physical possession of one

[1] *Ib.*, Case of Alton Woods, 1 Rep. 41 a (n.), 46 b.

[2] See Woolley *v.* A.-G. of Victoria, 2 App. Cas. 163. As to mines royal in Scotland, and settlements by a Crown grantee of lands contained therein, see Breadalbane *v.* Jamieson, 2 Sess. Cas. (4th ser.) 826.

[3] See McDonnell *v.* McKinty, 10 Ir. L. R. 527. See also Taylor *v.* Parry, 1 Scott, N. R. 576; Wild *v.* Holt, 9 M. & W. 672.

[4] Davis *v.* Shepherd, 1 Ch. 415.

[5] See p. 420.

[6] See Thew *v.* Wingate, 10 B. & S. 714 n., 720 n., 721 n.; Smith *v.* Stocks, *ib.* 701, 712.

[7] See Doe *v.* Alderson, 1 M. & W. 212. As to tin-bounds, see *post*, Chap. XVIII., Sects. 2, 3, 4.

[8] See McDonnell *v.* McKinty, *u. s.* Thew *v.* Wingate, 1 B. & S. 721 n.

[9] Davis *v.* Shepherd, *u. s.*, 415.

seam of coal does not of itself create any presumption of the possession of all the other seams of coal lying thereunder.[1] A person who has a licence to work a whole mine or quarry, and who enters on a part, is only, for rating purposes, in occupation of the part.[2]

[1] See Low Moor Co. *v.* Stanley Co., 34 L. T. N. S. 186, 189.

[2] R. *v.* Fayle, 27 L. T. 24. As to licenses, see *post*, Chap. XII. The principles stated in the text are of frequent importance in questions arising under the Limitation Acts, and in questions involving trespass. See, as to these, *post*, Chap. XXII., Sect. 1, *b.*; Sect. 2, *b.*

CHAPTER III.

WORKINGS AND USER FOUNDED ON PROPERTY OR POSSESSION—ORDINARY TENANCIES IN FEE OR FOR LIFE OR YEARS OR AT WILL—REVERSIONS AND REMAINDERS—TRUSTEES.

SECT. 1.—WORKINGS—TENANT IN FEE.

(*a*) *Tenant in Fee Simple.*

Tenant in fee simple.

A TENANT in fee simple in possession of lands has, as between himself and his successor in title, an absolute right of property in the mines and quarries beneath and within them, as being part of his inheritance.[1] And he has a similar right in the minerals which they contain.[2] He may, in fact, commit what legal waste he pleases.[3] He has, therefore, a clear right, as between himself and his successor in title, to open and work all mines and quarries beneath and within his lands; and he may freely dispose of the produce of his working. And his right to commit equitable waste is the same as

[1] See the timber case of A-G. *v.* Marlborough, 3 Madd. 537. The principles applicable to timber cases apply generally to cases of mines and quarries (see Buckley *v.* Howell, 29 Beav. 555, 556, 557). No doubt, if, at the time when the title of a tenant for life or years accrues, a mine or quarry has been partially worked, he may continue the working; whereas, if, at the same time, a wood has been partially felled, he cannot, unless dispunishable for waste, fell the other trees in the wood (see the argument in Dickin *v.* Hamer, 1 Dr. & Sm. 284, 291, 292). And, on the other hand, particular trees, or clumps of trees, in which a person under disability is interested, will sometimes, in a due course of management, be directed by the Court to be cut, when, under like circumstances, a mine would not be directed to be worked (see *Re* Smith, 10 Ch. 84, 85). However, in the former case, the right in respect of a mine or quarry should not, it is submitted, be compared with that in respect of a wood or forest, but rather with that in respect of a single tree. And in the latter, the direction is put upon some such special ground, as that the trees are too old, or that their cutting would be for the benefit of other trees.

[2] A.-G. *v.* Marlborough, *u. s.*

[3] 3 Bl. Com. 223.

his right to commit legal waste, and depends on the same principles. A tenant in fee simple in possession, subject to an executory devise over, is, *primâ facie*, dispunishable for legal waste ;[1] although it is competent to a settlor by express words to render him punishable.[2] He cannot, however, *primâ facie*, commit equitable waste.[3]

Infant. An infant tenant in fee simple in possession may, by his guardian, work mines and quarries, open and new.[4]

Lunatic. Mines or quarries belonging to a lunatic tenant in fee cannot, it would seem, be worked under the order of the Court, however beneficial such a course may be for the lunatic.[5] The Court has not, it would seem, any power to sanction such a working, except through the medium of a statutory sale or lease.[6] No doubt, in *Ex parte Tabbert*,[7] an agreement by the committee of a lunatic tenant for life without impeachment of waste,[8] that coal under the lunatic's estate should be worked by the owner of the adjoining land, was established on the ground that the working would be for the benefit of the lunatic ; and the Lord Chancellor,[9] in sanctioning it, compared the case to that of cutting timber. However, in *Re Smith*,[10] it was said,[11] that, wherever the Court has made orders with respect to the cutting of a lunatic's timber, it has done so in a due course of management on some such special ground as that the timber was too old, or that the cutting of it was for the benefit of other timber ;[12] but that to direct the severance of a lunatic's minerals would be to direct a disposition of a portion of the inheritance ; that, accordingly, no analogy existed between the

[1] See the timber case of Turner *v.* Wright, 1 Joh. 740 ; 2 De G. F. & J. 234 ; overruling the dicta to the contrary in Robinson *v.* Litton, 3 Atk. 209 ; Stansfield *v.* Habergham, 10 Ves. 278 ; and Wright *v.* Atkyns, T. & R. 157. See also Blake *v.* Peters, 10 W. R. 826 ; 1 De G. J. & S. 345.

[2] Blake *v.* Peters, *u. s.*

[3] Turner *v.* Wright, *u. s.*

[4] Lyddal *v.* Clavering, cited Amb. 371 n. As to open and new mines, see *ante*, pp. 22, *et seq.* See also the provisions of the Act 44 & 45 Vict. c. 41, referred to *infra*, Sect. 4.

[5] *Re* Smith, 10 Ch. 85.

[6] See Lun. Reg. Act, 1853, ss. 116, 124, 130, 131 ; *post*, Chap. VII., Part A., Sect. 1, *a* ; Chap. VIII., Sect. 1, *a*.

[7] 6 Ves. 428.

[8] A tenant for life, without impeachment of waste, stands with respect to legal waste on the same footing, in most respects, as a tenant in fee : see *infra*, Sect. 2, *b* (*β*).

[9] Lord Eldon.

[10] 10 Ch. 86.

[11] *Per* James, L.J.

[12] See *Ex parte* Bromfield, 1 Ves. J. 453.

two cases; and that the Court had no jurisdiction to direct the severance of a lunatic's minerals. And, although *Ex parte Tabbert* was not cited in *Re Smith*, it cannot stand beside it as a decision.[1] However, where such a course is for a lunatic's benefit, his personalty will be laid out under the sanction of the Court in expenses incident to the working of his open mines or quarries, as, for instance, in the erection of a fire engine; and, in sanctioning it, the Court will pay no regard to the interest of his heir on the one hand, or of his personal representative on the other.[2]

(β) *Tenant in Tail.*

Tenant in tail.

A tenant in tail in possession may commit what legal and equitable waste he pleases, and convert to his own use the property wasted. And, to enable him to do so, it is not necessary that he should bar the entail.[3] A tenant in tail of lands entailed by Parliament has, *primâ facie*, the same right to commit waste as an ordinary tenant in tail.[4] But his right would be restricted, if the exercise of it would or might involve the destruction of a mansion-house which the Legislature desired to preserve.[5] A tenant in tail, after possibility of issue extinct, occupies, with respect to waste, the same position as a tenant for life without impeachment of waste.[6]

Infant.

An infant tenant in tail in possession may, by his guardian, work mines and quarries, open and new.[7] The observations

[1] Not merely is *Re* Smith the more recent decision, but it is possible, that, if the jurisdiction which was disclaimed in that case, was properly exerciseable in Lord Eldon's time, it ceased to be properly exerciseable after the passing of the Lun. Reg. Act, 1853.

[2] Oxenden *v.* Compton, 2 Ves. J. 73.

[3] Co. Litt. 224, a.; 2 Bl. Com. 115. See the timber cases of Jervis *v.* Bruton, 2 Vern. 251; A.-G. *v.* Marlborough, 3 Madd. 531, 532.

[4] A.-G. *v.* Marlborough, 3 Madd. 539, 540.

[5] *Ib.*, pp. 545, *et seq.* This was a timber case: but the principle would apply to the removal of minerals, which acted as a support to a mansion.

[6] See the timber case of Williams *v.* Williams, 15 Ves. 427, 430; A.-G. *v.* Marlborough, 3 Madd. 538, 539; Turner *v.* Wright, 2 De G. F. & J. 247. See, however, the timber case of Abrahall *v.* Bubb, 2 Swanst. 173. See *infra*, Sect. 2, *b* (β).

[7] See Lyddal *v.* Clavering, cited Amb. 371 n.; Clavering *v.* Clavering, Mosely, 223. See also the provisions of the Act, 44 & 45 Vict. c. 41, referred to, *infra*, Sect. 4.

Lunatic.

already[1] made as to the working of mines or quarries belonging to a lunatic tenant in fee simple apply in the case of a lunatic tenant in tail.

Sect. 2.—Workings—Tenant for Life or Years or at Will.

a. Rights as respects Open Mines or Quarries.[2]

(*a*) *Generally.*

General presumptive right to work open mines

It is the general *primâ facie* right of a tenant for life or years, as between himself and the reversioner or remainderman, to work open mines: and if he does so work, he has the right of property in the minerals, which by the working he converts into chattels.[3] And if he derives his interest under a will, his rights are irrespective of whether trustees of that will have or have not been appointed by the testator.[4] And the same principles apply in the case of open quarries.[5] It is no doubt true, that stone or slate is frequently dug from a quarry for the purpose of building or repairing houses on the property of the owner, and that a person subsequently becoming the tenant for life or years cannot, by the mere fact of such digging, claim the right to work the quarry. But in such a case the quarry has never in fact become an open quarry.[6] Similarly, where a bog, which had been previously cut for sale, is demised for life or years as bog, the tenant may, *primâ facie*, cut and sell turf thereout.[7] And a lessee under any lease made on or after the

and quarries.

Irish leases.

[1] *Ante*, p. 44.

[2] As to open mines or quarries, see *ante*, pp. *et seq.*

[3] Saunders' Case, 5 Co. 12 a.; Co. Litt. 54 b.; Astry *v.* Ballard, 2 Mod. 193; Campbell *v.* Leach, Amb. 748; Clavering *v.* Clavering, Mosely, 223; 2 P. Wms. 388; Plymouth *v.* Archer, 1 B. C. C. 160; Stoughton *v.* Leigh, 1 Taunt. 402; Viner *v.* Vaughan, 2 Beav. 466; Ferrand *v.* Wilson, 15 L. J. 41, 53; S. C. 4 Ha. 388; Spencer *v.* Scurr, 31 Beav. 334; Bagot *v.* Bagot, 32 Beav. 516; Clegg *v.* Rowland, 2 Eq. 160; Miller *v.* Miller, 13 *ib.* 263; Elias *v.* Snowdon, &c. Co., 4 App. Cas. 454.

[4] See Thursby *v.* Thursby, 19 Eq. 413.

[5] Elias *v.* Griffith, 8 Ch. D. 521, 526, 532; nom. Elias *v.* Snowdon, &c., Co., 4 App. Cas. 454; overruling Mansfield *v.* Crawford, 9 Ir. Eq. Rep. 271: see also Moyle *v.* Mayle, Owen, 66, 67; Ferrand *v.* Wilson, 15 L. J. Ch. 54; Huntley *v.* Russell, 13 Q. B. 583; Tucker *v.* Linger, 21 Ch. D. 27.

[6] See Elias *v.* Griffith, 8 Ch. D. 532: see *ante*, p. 24.

[7] Anon., 1 Hog. 147; Jack *v.* Creed, 2 Hud. & Bro. 143; Coppinger *v.* Gubbins, 3 Jo. & L. 410. These cases must be taken to overrule Waterpark *v.* Austen, 1 Jones, 627 n.

1st January, 1861, of land in Ireland containing open mines has, *primâ facie*, a statutory right to work them and remove the minerals, whether they are granted by name or not in the lease.[1] If a reversioner or remainderman complains, that a tenant for life or years is improperly working a mine or quarry; and the latter alleges, that it was open when he entered into possession; and no lapse of time has occurred; the onus is in general on the latter to prove his allegation.[2] If, however, a tenant for life or years shows, that there had, in fact, been workings when he entered into possession, the onus is in general shifted, and it then lies on the reversioner or remainderman to show, that the workings were not such as to constitute the mine or quarry an open mine or quarry.[3] In like manner, where a tenant for life or years of a mine or quarry has once shown, that a lease of the mine or quarry had been granted, and that workings coeval therewith had taken place on the land subject to the lease; and his own subsequent workings have extended over a long period; and during that period the owner of the inheritance was capable of ascertaining all the facts, was competent to act, and remained passive; it lies on such owner to show, that the workings did not take place under the authority of the lease.[4]

Onus of proof when fact of being open disputed.

On similar principles, a tenant for life or years was held entitled to receive the capital of the proceeds of a sale by the trustees of his settlement of gravel dug from lands, the profits of which had usually for many years been gained by working the gravel pits. The whole of the gravel was, in effect, a mine, and each gravel pit a fresh pit in the mine.[5] So a tenant for life or years is entitled to the capital of rents or royalties payable under a lease of mines made by, or in pursuance of powers given by, his settlor;[6] or payable in respect of a new

Proceeds of sales.

Rents.

[1] 23 & 24 Vict. c. 154, s. 27.

[2] Elias *v.* Snowdon, &c. Co., 4 App. Cas. 461. Cf. Bartlett *v.* Phillips, 4 De G. & J. 421.

[3] Elias *v.* Snowdon, &c. Co., *u. s.*, 459, 461, 462; Atherley *v.* Sanders (Ap. 1881, *coram* Kay, J.). See, however, Bartlett *v.* Phillips, 4 De G. & J. 461.

[4] Elias *v.* Snowdon, &c. Co., *u. s.*, 461, 462.

[5] Cowley *v.* Wellesley, 1 Eq. 659; 35 Beav. 639.

[6] See Daly *v.* Beckett, 24 Beav. 114; Cowley *v.* Wellesley, 35 Beav. 638, 639; Miller *v.* Miller, 13 Eq. 263; Brigstocke *v.* Brigstocke, 8 Ch. D. 363.

seam opened by the lessee in a mine demised by his settlor.[1]

Dowress.

A dowress stands upon the same footing, for the purpose of working mines, as an ordinary tenant for life. If, therefore, lands be actually assigned to a lady for her dower,[2] and such lands contain open mines or quarries, she may, *primâ facie*, work them for her own benefit.[3] And even if no actual assignment of lands be made to her, she is entitled, *primâ facie*, to receive one-third of the corpus of the sale proceeds;[4] or of the rents or royalties payable under a lease;[5] of the open mines or quarries which they contain. Similarly, if a lease of unopened mines or quarries be granted before an assignment is actually made to the dowress, and if, as incident to the lease, liberty be given to the lessee to use any portion of the surface, the dowress is entitled, *primâ facie*, to receive one-third of the corpus of the rent payable in respect of such liberty.[6]

Presumption rebuttable.

The *primâ facie* right of a grantee for life or years, as against the grantor, is not rebutted by an exception in a lease of land containing open quarries of "all royalties."[7] The *primâ facie* right of a tenant for life, as against the remainderman, to work open mines and quarries may of course be negatived by directions by the settlor to the contrary. Thus, in *Ferrand* v. *Wilson*[8] a testator devised certain lands in strict settlement, with liberty for each tenant for life in succession to get stone upon the premises for buildings and repairs, but for no other use or purpose whatsoever; and in a subsequent part of his will he recited, that he had thereby restrained, and did thereby intend to restrain, each and every such tenant for life from

[1] Spencer *v.* Scurr, 31 Beav. 334: *ante*, p. 24. In Scotland the question is usually one of the intention of the settlor. In Guild's Trustees *v.* Guild (10 Sess. Cas. Ser. 3, 911), and Wardlaw *v.* Wardlaw's Trustees (2 *ib.* Ser. 4, 368), the tenant for life was held entitled to the capital of the rents. *Contra* in Ferguson *v.* Ferguson's Trustees, 4 *ib.* 532.

[2] See *post*, Chap. XIII., *d.* (α).

[3] Stoughton *v.* Leigh, 1 Taunt. 402; Dickin *v.* Hamer, 1 Dr. & Sm. 295.

[4] See and consider Dickin *v.* Hamer, *u. s.*

[5] See Stoughton *v.* Leigh, 1 Taunt. 402.

[6] Dickin *v.* Hamer, 1 Dr. & Sm. 284, 299. As to infants, see the provisions of the Act 44 & 45 Vict. c. 41, referred to *infra*. Sect. 4.

[7] Brown *v.* Chadwick. 7 Ir. C. L. Rep. 108; Listowel *v.* Gibbings, 9 *ib.* 223; overruling Purcell *v.* Nash, 1 Jones, 625; 2 Jones, 116.

[8] 15 L. J. Ch. 41, 54: S. C. 4 Ha. 344, 388.

getting any stone upon the premises, save for the purposes aforesaid. It was held, that a tenant for life was not entitled to get stone even from quarries open at the testator's death, except for the purposes in the will mentioned. And a lessee under any lease made on or after the 1st of January, 1861, of land in Ireland, containing open quarries or open beds of sand, marl, gravel, or clay, although entitled to work them for the purposes of agriculture, and the erection or repair of necessary buildings, is, *primâ facie*, under a statutory disability to do so for trade or manufacture, or for profit or sale.[1]

Tenant at will.

A mere tenant at will has no right of property in minerals, which by working are converted into chattels.[2]

(β) *Residuary Gift in Will.*

General disability under residuary gift.

The general principle as to the *primâ facie* right of a tenant for life or years of open mines or quarries to work them; or, if they are in lease, to appropriate the rents and royalties; does not, *primâ facie*, apply, where mines or quarries are comprised in a residuary gift in a will. It is a well established rule, that, where a will contains a gift not specific of a subject in its nature perishable or speculative, that subject should, even in the absence of a trust for conversion, be converted and invested; so that the tenant for life may receive the income during his life, and the person entitled in remainder may enjoy the capital afterwards.[3]

Contrary intention.

But, of course, the rule itself will yield to indications of a contrary intention in the will in question. Where, for instance, a testator devised his residuary real estate to trustees upon trust to sell "when in their discretion it may seem advisable"; and directed, that the rents "and profits" should until sale be considered as part of his personal estate, and be applicable in the same manner as the income from the investments of the sale moneys; and gave the income of the investments to a tenant for life, with remainder as to the capital over; and part

[1] 23 & 24 Vict. c. 154, s. 28.
[2] A.-G. *v.* Tomline, 5 Ch. D. 758.
[3] See Howe *v.* Dartmouth, 7 Ves. 137; Wightwick *v.* Lord, 6 H. L. Cas. 228; Thursby *v.* Thursby, 19 Eq. 406.

of the residue was a brickfield which the testator had demised upon royalties; and the trustees in the exercise of their discretion abstained from selling, and allowed the brickfield to be worked out; it was held, that the tenant for life was entitled to the royalties absolutely, and not merely to the income which they would have produced if invested.[1] So, a power to trustees, "in case they shall deem it beneficial so to do, to conduct, carry on, and continue the collieries which I am possessed of," will relieve them from the obligation to convert; and the property will be enjoyable in its actual state, as between the tenant for life and the remainderman.[2]

Wightwick *v.* Lord.

Wightwick v. *Lord*[3] illustrates the same rule. There a testator gave his residuary real and personal estate to trustees upon trust "at some convenient and proper period, with the approbation of his son," to sell and convert, and gave his daughter a charge for her life on the proceeds, and made his son his ultimate residuary legatee, and appointed his son and the trustees his executors. The residue included a leasehold colliery. There were no specific directions as to the payment of the testator's debts, and the state of the assets was such that it was impossible to pay the debts without selling the colliery. The trustees renounced and disclaimed, and the son took on himself the administration and the execution of the trusts. He did not, however, ascertain and secure the residue at the end of a year from the testator's death; but worked the colliery to a profit for several years, when it ceased to be of any value. It was held, (1) that the terms of the will authorized a postponement of the sale of the colliery, but that the authority could not, in the state of the assets, operate until the debts had been paid. It was, therefore, held (2), that the son was not, as against the daughter, entitled to postpone the sale; (3) that, having postponed it, he was chargeable with the value of the colliery at the end of a year from the testator's death, with interest thereon; and (4) that that value must be calculated as constituted of the aggregate of the annual profits derived from

[1] Miller *v.* Miller, 13 Eq. 263. See also Thursby *v.* Thursby, 19 Eq. 395, 414.

[2] Thursby *v.* Thursby, *u. s.*

[3] 6 H. L. Cas. 217.

the colliery in all the subsequent years, till it became unproductive, such annual profits to be treated as deferred payments.[1]

b. Rights as respects New Mines or Quarries[2]*—Legal Waste.*

(a) Generally.

Limited rights as respects new mines or quarries.

A tenant for life or years may, *primâ facie*, as between himself and the reversioner or remainderman, dig in a new mine or quarry, in a reasonable degree, for gravel, clay, coal, and limestone, for the reparation of the house and other estovers.[3] So, he may dig for turf in a bog for purposes of consumption.[4] And a lessee under any lease made on or after the 1st January, 1861, of land in Ireland containing turf bog unreclaimed and unprofitable for agriculture; or who has been given a right of turbary on the premises, or a right of common of turbary on other premises; has, *primâ facie*, a statutory right to cut and use turf bog for the use on the demised premises of the lessee and his subtenants.[5] However, except under the above stated circumstances, a tenant for life or years is not, in general, entitled, *primâ facie*, as between himself and the reversioner or remainderman, to open or work a new mine or quarry;[6] or to cut turf in a

General disability in other respects—legal waste.

[1] Affirming Lord *v.* Wightwick, 4 De G. M. & G. 803, which varied S. C. 1 Dr. 576. See the form of the decree, 4 De G. M. & G. 811, *et seq.*

[2] As to new mines or quarries, see *ante*, pp. 22, *et seq.*

[3] Co. Litt. 53 b; 2 Roll. Abr. 816: see also Moyle *v.* Mayle, Owen, 66, 67: cf. the timber cases of Simmons *v.* Norton, 7 Bing. 640; Marlborough *v.* St. John, 5 De G. & Sm. 174. See, however, Ferrand *v.* Wilson, 15 L. J. Ch. 54.

[4] Wilson *v.* Bragg, 8 Bac. Abr. 428; De Salis *v.* Crossan, 1 B. & B. 188; nom. De Salis *v.* ——, 2 Mol. 516; Courtown *v.* Ward, 1 Sch. & L. 8; Howley *v.* Jebb, 8 Ir. C. L. R. 435; Coppinger *v.* Gubbins, 3 J. & L. 410.

[5] 23 & 24 Vict. c. 154, s. 29.

[6] Saunders' Case, 5 Co. 12 a; Co. Litt. 53 b, 54 b; D'Arcy *v.* Askwith, Hob. 234; Astry *v.* Ballard, 2 Mod. 193; Campbell *v.* Leach, Amb. 748; Whitfield *v.* Bewit, 2 P. Wms. 242; Plymouth *v.* Archer, 1 B. C. C. 160; Wentworth *v.* Turner, 3 Ves. 3; Anon., cited in Mitchell *v.* Dors, 6 *ib.* 147; S. C. nom. Flamang's Case, 7 *ib.* 308; De Salis *v.* Crossan, *u. s.*; Viner *v.* Vaughan, 2 Beav. 466; Ferrand *v.* Wilson, 15 L. J. Ch. 41, 53; S. C. 4 Ha. 344; Daly *v.* Beckett, 24 Beav. 120; Spencer *v.* Scurr, 31 *ib.* 334; Bagot *v.* Bagot, 32 *ib.* 516; Stepney *v.* Chambers, W. N. 1866, p. 401; Clegg *v.* Rowland, 2 Eq. 165; Elias *v.* Snowdon, &c. Co., 4 App. Cas. 454. An enquiry will, if necessary, be directed, whether any and what mines and quarries have been opened and worked by any and what persons, which were not opened at the commencement of the interest of the

bog.[1] For all such acts on his part would, although he has the right of possession,[2] and may maintain trespass for wrongful workings by other persons,[3] constitute legal waste.[4] And a lessee for a long term cannot, of course, claim the right to open and work on the mere ground, that it would be against public policy to prevent the working until the term ends.[5] And a lessee not being able to give his assignee any better title than he has himself, if a lessee opens a new mine, and then assigns over his estate, the assignee cannot, of course, dig in such mine.[6] And a lessee of lands in Ireland for an estate less than a perpetual estate under any lease made after the 1st January, 1861, is, *primâ facie*, under a statutory disability to work new mines or quarries therein, or (except as regards turf bog[7]), to remove the soil or surface or subsoil thereof.[8] And a lessee under any lease made on or after the 1st January, 1861, of land in Ireland containing turf bog unreclaimed and unprofitable for agriculture; or who has been given a right of turbary on the premises, or a right of common of turbary on other premises; is, *primâ facie*, under a statutory disability to cut and use the turf bog for trade or manufacture, or for profit or sale.[9]

Tenant by curtesy—dowress—jointress.

The estate of a tenant by the curtesy,[10] or a dowress,[11] or a jointress,[12] is an estate for life impeachable of waste. If, therefore, lands actually assigned to a lady for her dower[13] contain new mines or quarries, she cannot, *primâ facie*, work them.[14]

Tenant for renewable lives or years.

Independently of statute, a tenant for lives renewable for ever stands with respect to waste on the same footing as an ordi-

tenant for life or years. For the form, see Ferrand *v.* Wilson, 4 Ha. 388, 389; Gresley *v.* Mousley, 4 De G. & J. 101, 102; S. C. 3 De G. F. & J. 433; Bagot *v.* Bagot, Seton, 187, 188.

[1] See Wilson *v.* Bragg, 8 Bac. Abr. 428; Courtown *v.* Ward, 1 Sch. & L. 8; Coppinger *v.* Gubbins, 3 J. & L. 410: see also Burrows *v.* Hayes, Hay. & Jo. 597; Chatterton *v.* White, 1 Ir. Eq. Rep. 200; Massy *v.* Gubbins, Longf. & Towns, 88.

[2] See *ante*, p. 32.

[3] See *post*, Chap. XXII., Sect. 2. *b.*

[4] Co. Litt. 53 b; 54 b; Keyse *v.* Powell, 2 E. & B. 144; Clegg *v.* Rowland, 2 Eq. 165.

[5] See Elias *v.* Griffith, 8 Ch. D. 525.

[6] Saunders' Case, 5 Co. 12 a.

[7] As to which, see *ante*, p. 51.

[8] 23 & 24 Vict. c. 154, s. 26.

[9] S. 29.

[10] 1 Cruise, 158: see the timber case of Roberts *v.* Roberts, Hard. 96.

[11] See Stoughton *v.* Leigh, 1 Taunt. 402, 410: cf. the timber case of Bishop *v.* Bishop, 10 L. J. Ch. 302.

[12] See Clavering *v.* C. Mosely, 223; Tracy *v.* Tracy, 1 Vern. 23.

[13] See *post*, Chap. XIII., *d.* (a).

[14] Wilson *v.* Bragg, 8 Bac. Abr. 428; Dickin *v.* Hamer, 1 Dr. & Sm. 284, 295.

nary tenant for life.[1] And the law is the same with respect to a tenant for years renewable for ever.[2] However, every tenant of lands in Ireland entitled to a perpetual interest under any lease made after the 1st January, 1861, has, *primâ facie*, a statutory right to commit waste other than fraudulent or malicious waste.[3]

Contrary intention.

However, where a man demises a bog, and no other property is included in the demise, and the bog is not convertible to any other use except that of cutting for sale, the lessee may, *primâ facie*, cut it for sale.[4] And where a man has unopened mines within his land, and demises for life or years such land, "with all mines therein," the lessee may, *primâ facie*, as between himself and his grantor, dig the unopened mines, and will not, by so doing, commit waste:[5] for otherwise the words "with all mines therein" would have no effect.[6] In fact, in each of these cases a mining lease, or its equivalent, has been granted. But where a man has within his land some mines opened and some unopened, and leases his land for life or years, "with the mines therein," the open mines only will be comprised in the lease, and the lessee cannot, *primâ facie*, even as between himself and his grantor, dig the unopened mines.[7] And different principles apply to the conflicting claims of a limited owner and a reversioner; and those of a limited owner and a remainderman, who is not the author of the settlement. If, for instance, a man seised in fee, grants the "lands and all mines therein," to trustees in fee to the use of one person for life with remainders over, the tenant for life cannot, *primâ facie*, as between himself and the remainderman, open new mines: and the fact that

[1] It was formerly considered, that a lessee for lives renewable for ever might cut turf for sale, or otherwise commit waste (Conolly *v.* Ely, 2 Moll. 515; Percy *v.* Shanly, *ib.*; Calvert *v.* Gason, 2 Sch. & L. 561; Harris *v.* Coppinger, 1 Hog. 478), unless there were special circumstances in his case, as where he owed a large arrear of rent (Pim *v.* Davies, 1 Hog. 11; White *v.* Nowlan, *ib.* 21); but this is not now law: see White *v.* Walsh, 1 Jones 626, n.; Coppinger *v.* Gubbins, 3 J. & L. 410.

[2] Harris *v.* Coppinger, 1 Hog. 478.

[3] 23 & 24 Vict. c. 154, s. 25.

[4] Anon., 1 Hog. 147; Jack *v.* Creed, 2 Hud. & Bro. 143; Coppinger *v.* Gubbins, 3 J. & L. 410.

[5] Saunders' Case, 5 Co. 12 a; Co. Litt. 54 b; D'Arcy *v.* Askwith, Hob. 234; Clegg *v.* Rowland, 2 Eq. 160.

[6] Co. Litt. 54 b.

[7] *Ib.*; Astry *v.* Ballard, 2 Mod. 193; Clegg *v.* Rowland, *u. s.*

the whole of the mines in question are new mines is immaterial.[1]

Meliorating waste.

And a limited owner may be free from liability for working, if his working has amounted to meliorating waste, and is based upon custom.[2] Where, for example, an agricultural tenant agreed to cultivate the land according to the most approved system, and to commit no waste, and to use it for agricultural purposes only; and the land was in a district where large numbers of flints came to the surface in the ordinary course of ploughing, and their removal was necessary in order to cultivate the land effectually; and there was evidence,[3] that it was the custom of the country for tenants to remove such[4] flints and sell them, when not prohibited by their leases; and the tenant did not plough for the purpose of getting the flints, but complied strictly with the custom; it was held, that the custom was reasonable and good, and that the landlord had no remedy.[5] Indeed, similar principles have in some cases been applied independently of custom. A limited owner has, for instance, been held free from liability for removing turf from a bog and converting it to his own use, where the removal had enabled a deeper layer of earth to be planted or ploughed.[6] So, he may, it has been said, be free from liability for removing stones from land and selling them, if the stones had previously covered the land to such an extent as to render it unfit for cultivation.[7] It

[1] See Whitfield *v.* Bewit, 2 P. Wms. 242; Daly *v.* Beckett, 24 Beav. 120.

[2] See generally as to meliorating waste, Doherty *v.* Allman, 3 App. Cas. 709.

[3] Cotton, L. J., doubted (see Tucker *v.* Linger, 21 Ch. D. 37, 38) whether the custom had been proved.

[4] Observe the limited nature of the custom.

[5] Tucker *v.* Linger, 21 Ch. D. 18. It is understood, that this case is now under appeal to the House of Lords.

[6] Coppinger *v.* Gubbins, 3 J. & L. 417, 418; Harris *v.* Ekins, 20 W. R. 999. See, however, the question asked by Jessel, M. R., in Tucker *v.* Linger, 21 Ch. D., p. 32.

[7] Harris *v.* Ekins, *u. s.*, *per* Bacon, V. C.: see also Jesus Coll. *v.* Bloome, Amb. 55, 56. A limited owner cannot, it is submitted, work, or be authorized by the Court to work, on the mere ground, that the working should not be deferred. The power to cut particular clumps of timber in a due course of management (Cowley *v.* Wellesley, 1 Eq. 656; 35 Beav. 635; Honywood *v.* Honywood, 18 Eq. 310; and cases there cited) furnishes no analogy upon this point: see and consider *Re* Smith, 10 Ch. 85; *ante*, p. 43, n. [1]. Lord Romilly, however, in Bagot *v.* Bagot (32 Beav. 522; Set. 188), appears to have laid down the law differently.

should be observed, however, that a right of removal does not necessarily imply a right of appropriation or sale. There may, as Lord Coke says,[1] be waste "by the vendition." And it seems open to question, whether, independently of custom, a right of appropriation or sale can be properly founded on the doctrine of meliorating waste.[2] At all events, independently of custom, a person will not, it seems, on the mere assertion, that he will improve land after he has committed a waste, be allowed to commit the waste in the first instance.[3]

Intermediate termor.

It has been held, that an intermediate assignee of a term, who has never himself worked, but has received royalties under sub-leases granted before he came into possession, and has parted with his interest before the commencement of proceedings by the reversioner, is not liable to account either for the profits made, or for the royalties paid to him, during his possession of the term.[4]

(β) "*Without Impeachment of Waste.*"

"Without impeachment of waste."

An estate may be given to a person for life or years "without impeachment of waste."[5] And a tenant for life or years without impeachment of waste may, *primâ facie*, open and work new mines or quarries.[6] And, although, as has been seen,[7] he has no right of property in the mines or quarries themselves; nor, so long as they remain unsevered, in the minerals contained therein; he has a right of property in such minerals, as soon as, by working, he converts them into chattels.[8] The words "without impeachment of waste" give a power to the lessee which will produce an interest in him, if he exercises his power

[1] Co. Litt. 53 b.

[2] See Tucker *v.* Linger, 21 Ch. D. 27, 28, *per* Kay, J.

[3] Coppinger *v.* Gubbins, 3 J. & L. 418, *per* Lord St. Leonards.

[4] See Elias *v.* Griffith, 8 Ch. D. 521, 534.

[5] As to the right of a person claiming under an executory trust to be made dispunishable for waste, see Stanley *v.* Colthurst, 10 Eq. 259, and cases there cited.

[6] See the seventh and eighth resolutions in Bowles' Case, L. C. Conv. 37; Dicconson *v.* Talbot, 6 Ch. 38. Where it is desired that a tenant for life should be empowered to work new mines or quarries, the power should be given in express terms, and be made subject in express terms to all proper conditions. For the form of such a power, see Dav. iii. pp. 1076, 1077.

[7] See *ante*, pp. 32, 33.

[8] See the eighth resolution in Bowles' Case, *u. s.*; Pyne *v.* Dor, 1 T. R. 55, 56.

Lunatic.

during the privity of his estate."[1] The observations already[2] made as to the working of mines or quarries belonging to a lunatic tenant in fee simple apply in the case of a lunatic tenant for life without impeachment of waste.

c. Lien for Expenditure.

Lien for expenditure.

A tenant for life, who for many years made large annual payments in respect of foreign mines to keep them continually worked, and so prevent their being forfeited, was, although they were unproductive, held entitled, as against the remainderman, to a charge on the estate, for his outlay. But he was, in the same case, held disentitled to any charge in respect of moneys, which he voluntarily expended on copper works in England.[3]

d. Improper Workings—Legal Waste—Remedies.[4]

(*a*) *Damages—Account.*

Remedies—damages—account.

If the injured party has the right of property in the minerals improperly worked; if, for instance, he is the reversioner or remainderman in fee or in tail;[5] he may maintain an action to recover them:[6] or he may have an action for damages:[7] or an account.[8] And his right to an account was never, as in legal

[1] See the seventh resolution in Bowles' Case, L. C. Conv. 37: see also Williams *v.* Williams, 15 Ves. 425.

[2] *Ante*, p. 44.

[3] Dent *v.* Dent, 30 Beav. 363.

[4] Formerly if a limited owner, impeachable of waste, committed waste, the remedy of forfeiture of the place wasted was open to the person entitled to an estate of inheritance in remainder or reversion, if he issued a writ of waste; and he was also entitled to treble the value of the thing wasted (6 Ed. 1, c. 5; Jes. Coll. *v.* Bloome, 3 Atk. 263; Wentworth *v.* Turner, 3 Ves. 3). But these remedies were abolished by 3 & 4 W. 4, c. 27, s. 36. Cf. as to copyholds, and church lands, *post*, Chap. IV., Sect. 1, *b*; Sect. 3, *a. c.*

[5] See *ante*, p. 33.

[6] Trover formerly lay: see Clavering *v.* C. Mosely, 224. See also the timber cases of Bowles' Case, L. C. Conv. 37; Bewick *v.* Whitfield, 3 P. Wms. 268; Jesus Coll. *v.* Bloome, Amb. 34; Garth *v.* Cotton, 1 Lead. Cas. 751, 782, 790; Gent *v.* Harrison, Joh. 517, 524; Seagram *v.* Knight, 2 Ch. 632.

[7] Trespass formerly lay; or, if the minerals had been sold, an action for money had and received: see Gent *v.* Harrison, *u. s.*, 526; Seagram *v.* Knight, *u. s.*; Higginbotham *v.* Hawkins, 7 Ch. 676.

[8] See Jesus Coll. *v.* Bloome, Amb. 55, 3 Atk. 262; Garth *v.* Cotton, 1 L. C. 795; Jefferys *v.* Smith, 1 J. & W. 302; Parrott *v.* Palmer, 3 M. & K. 632; Ferrand *v.* Wilson, 4 Ha. 388; Coppinger *v.* Gubbins, 3 J. & L. 397; Elias *v.* Griffith, 8 Ch. D. 525, 526.

waste in timber cases before the Jud. Acts, confined to cases where he was entitled to an injunction;[1] mining operations having always been looked on as a species of trade.[2] And, of course, his rights are not put an end to by the death of the wrongdoer: he may have an account against his estate.[3]

Mining operations a species of trade.

If waste is committed by a tenant for life, acting in collusion with the first remainderman in fee or tail *in esse*; or by a person who combines in himself the two characters; to the prejudice of an intervening tenant in fee or tail not then *in esse*, whose rights are protected by the interposition of an estate given to trustees to preserve contingent remainders; the trustees may have an action for an account.[4] Indeed, as contingent remainders are no longer destructible,[5] the only purpose, which can at the present day be served by introducing, in a settlement, a limitation to trustees to preserve them, is that the contingent remaindermen may be protected against waste; and the land, the timber, and the mines, which together constitute the inheritance, preserved for them entire.[6] And, if waste is committed by a tenant for life, acting in collusion with a remainderman; or by a tenant for life, who is also himself a remainderman; or by a tenant for life, where there is no remainderman in fee or in tail *in esse*; a tenant for life in remainder, even if impeachable of waste, may have an account.[7] And, on the same principle, that a tenant for life in remainder may have an

Trustees to preserve contingent remainders.

Tenant for life in remainder.

[1] See Jesus Coll. *v.* Bloome, Amb. 35; Parrott *v.* Palmer, 3 M. & K. 632; Gent *v.* Harrison, Joh. 526; Higginbotham *v.* Hawkins, 7 Ch. 676.

[2] See Story *v.* Windsor, 2 Atk. 630; Lawton *v.* L., 3 Atk. 13, 16; Jesus Coll. *v.* Bloome, *u. s.*; Dudley *v.* Warde, Amb. 112, 114; Pulteney *v.* Warren, 6 Ves. 89; Flamang's Case. 7 Ves. 308; Wren *v.* Kirton, 8 Ves. 502; Crawshay *v.* Maule, 1 Swanst. 495, 528; Jefferys *v.* Smith, 1 J. & W. 298, 302; Rowe *v.* Wood, 2 *ib.* 555; Rose *v.* Nixon, *ib.*; Williams *v.* Attenborough, T. & R. 73, 74; Fereday *v.* Wightwick, 1 R. & My. 49; Taml. 260; Parrott *v.* Palmer, *u. s.*; Tredwen *v.* Bourne, 6 M. & W. 463; Hart *v.* Clarke, 6 De G. M. & G. 250; Clegg *v.* Edmondson, 8 *ib.* 814; Glasbrook *v.* Richardson, 23 W. R. 50; Rule *v.* Jewell, 18 Ch. D. 662.

[3] Garth *v.* Cotton, 1 L. C. 790, 791, 792; Lansdowne *v.* L., 1 Madd. 140; Bagot *v.* Bagot, 32 Beav. 509. For the form of the account, see Bagot *v.* Bagot, Set. 187, 188.

[4] Garth *v.* Cotton, *u. s.*, 757, 787; Birch-Wolfe *v.* Birch, 9 Eq. 683.

[5] See 40 & 41 Vict. c. 33.

[6] See Garth *v.* Cotton, *u. s.*, 771, 774, 776, 781, 794, 798, 799. The trustees are themselves liable, if they consent to the waste, *ib.* 779.

[7] See the timber cases of Harcourt *v.* White, 28 Beav. 303; Birch-Wolfe *v.* Birch, 9 Eq. 683.

action for an account against a tenant for life who commits waste, he may, on the death of the wrongdoer, when he becomes tenant for life in possession, make the estate of the wrongdoer accountable.[1]

Measure of damages.

Where an account has been directed against a wrongdoer or against his estate, interest at the rate of £4 per cent. per annum will be charged ;[2] and there will be no allowance for repairs or improvements.[3] But, although interest is in strictness due from the actual time of the wrongful working, it has been said, that the courts will endeavour to deal liberally with the estate of a deceased limited owner, and will be disinclined to allow an account of interest to be taken from a period anterior to his death.[4] Indeed it has been said, that this disinclination will exist, although it may have been impossible for the remainderman to have commenced his action in the lifetime of the limited owner.[5] The reason is stated to be that, in most cases, the parties being family relations, it would not be for their benefit to go into a long and expensive inquiry as to the nature of the waste committed, and the circumstances under which it was committed.[6] In other respects the account will be taken on the principles, which would have determined the measure of damages, if the wrongdoer had been a stranger.[7]

(β) *Mode of dealing with proceeds.*

No person *in esse* entitled to inheritance.

If, at the time of the improper working, there is not any person *in esse* entitled to an estate of inheritance in reversion or remainder, the severed chattels must be realized, invested, and dealt with ; or the amount to be accounted for must be in-

[1] Birch-Wolfe *v.* Birch. 9 Eq. 683.

[2] See Bagot *v.* Bagot, 32 Beav. 509, 519, 520 : see the timber cases of Garth *v.* Cotton, 1 L. C. 795 ; Williams *v.* Bolton, 1 Cox, 72 ; Leeds *v.* Amhurst, 14 Sim. 357 ; 2 Ph. 117.

[3] Bagot *v.* Bagot, *u. s.*, 523.

[4] See Bagot *v.* Bagot, *u. s.*, 519, 520. This case was appealed, but compromised, with the approval of Lord Westbury, who expressed his concurrence in Lord Romilly's view as to the time from which the account of interest should be taken : see 33 L. J. Ch. 122, n. See also the timber case of Leeds *v.* Amhurst, 14 Sim. 357 ; 2 Ph. 117. In Garth *v.* Cotton, *u. s.*, 795, interest was only allowed from the filing of the bill.

[5] Bagot *v.* Bagot, *u. s.*

[6] *Ib.*

[7] See Tucker *v.* Linger, 21 Ch. D. 29, *per* Kay, J. As to a stranger, see *post*, Chap. XXII., Sect. 2, *c.*

vested, and dealt with ; as part of the *corpus* of the estate.[1] The wrongdoer will not, however, be allowed to receive the income ;[2] but the income will be accumulated, and invested during his life, and added to the original investments.[3] And, if at the death of the wrongdoer, there is a person entitled in possession to an estate of inheritance, such person will be entitled absolutely to the principal of the total investments.[4] But if, instead of being succeeded by a person entitled in possession to an estate of inheritance, the wrongdoer is succeeded by a tenant for life, the income of the total investments will be paid to such tenant during his life, and, if necessary, to his successor in like manner, until some person becomes entitled in possession to an estate of inheritance ; who will thereupon also become absolutely entitled to the principal.[5] And, in order to entitle the tenant for life, who succeeds to the wrongdoer, to the income, it is not necessary that he should be unimpeachable of waste.[6]

Person *in esse* entitled to inheritance.

If, however, at the time of the improper working, there is any person *in esse* entitled, either indefeasibly[7] or defeasibly,[8] to an estate of inheritance, the property in the severed chattels ; or the amount to be accounted for ; will belong absolutely and immediately to such person, or (if there are more than one), to the first of such persons. And the right of the person so entitled is not affected by the circumstance that between his estate and that of the wrongdoer is interposed in the order of the limitations an estate for life *in esse* without impeachment of waste.[9] Accordingly, if an estate is settled

Illustrations.

[1] See Bagot *v.* Bagot, 32 Beav. 509, 522.

[2] *Ib.*

[3] *Ib.*

[4] *Ib.*

[5] *Ib.*

[6] *Ib.*

[7] *Ib.;* Bell *v.* Wilson, 1 Ch. 309. See the 5th resolution in Bowles' Case, L. C. Conv. 43, *et seq.* ; and the timber cases of Whitfield *v.* Bewit, 2 P. Wms. 239 ; Garth *v.* Cotton, 3 Atk. 751, 1 L. C. 820 ; Lee *v.* Alston, 1 B. C. C. 193, 3 *ib.*, 37 ; Seagram *v.* Knight, 2 Ch. 628; Higginbotham *v.* Hawkins, 7 Ch. 676 ; Honywood *v.* Honywood, 18 Eq. 306.

[8] In Bagot *v.* Bagot, *u. s.*, Lord Romilly laid it down, that the amount to be accounted for would not belong to the person entitled to the estate of inheritance, unless such person were entitled indefeasibly, and could not so belong if there was a possibility of a prior tenant in fee or tail coming into esse. This, however, is only a dictum, and is opposed to the earlier authorities, and Sir G. Jessel refused to follow it in Cavendish *v.* Mundy, W. N. 1877, p. 198.

[9] See the timber cases of Pigot *v.* Bullock, 1 Ves. jun. 484 ; Gent *v.* Harrison, Joh. 517, 524.

upon A. for life; remainder to B., either with or without impeachment of waste, for life; remainder to the unborn son of B., in fee or in tail; and A. engages in a series of improper workings; and during these workings the son of B. comes into *esse;* and A. is called on to account; the money to be accounted for will be dealt with as follows. So far as it can be attributed to the workings which took place prior to the birth of B.'s son, it will be invested and accumulated until A.'s death: the income of such accumulations will then be paid to B. during his life; and, upon B.'s death, the principal will belong to his son absolutely. But so far as it can be attributed to workings subsequent to the birth of B.'s son, it will belong immediately and absolutely to the son.[1]

Owner of inheritance a wrongdoer.

In order, however, to entitle the owner of an estate of inheritance to the produce of an improper working, he must be himself free from blame in respect of the working. If he be himself the wrongdoer, he will not be allowed to benefit by his wrongdoing. Thus, if lands are settled upon A. for life, remainder to B. for life, remainder to the son of B. in tail, remainder to the right heirs of X.; and B. has no son *in esse;* and A. is the right heir of X.; and A. improperly works; he will not be allowed to receive the produce.[2] In like manner, if the owner of an estate of inheritance collude with the tenant for life in an improper working, he will not be allowed to receive the produce of the working, to the prejudice of an intervening person not then *in esse,* who is entitled to a contingent estate of inheritance, and whose rights are protected by the interposition of an estate given to trustees to preserve contingent remainders.[3] In each of these cases the produce of the

Consequent

[1] See Bagot *v.* Bagot, 32 Beav. 509. This case was appealed, but compromised with the approval of Lord Westbury upon terms which support the propositions in the text. See 33 L. J. Ch. 122 n. For the form of the enquiries and accounts directed in Bagot *v.* Bagot, see Seton, pp. 187, 188.

[2] See the timber cases of Williams *v.* Bolton, 1 Cox, 72; Powlett *v.* Bolton, 3 Ves. 374; Birch-Wolfe *v.* Birch, 9 Eq. 683.

[3] See the timber cases of Garth *v.* Cotton, 1 L. C. 782; Birch-Wolfe *v.* Birch, *u. s.*; Honywood *v.* Honywood, 18 Eq. 311. The Court must, however, in every case, be satisfied that collusion has actually taken place. If the limited owner, who commits waste, has in other respects improved the estate, he may be allowed to keep the produce of the waste: Birch-Wolfe *v.* Birch, *u. s.*

working or the amount to be accounted for will be accumulated and invested during the life of the tenant for life; and, on his death, it will be dealt with as part of the *corpus* of the estate.[1] Moreover, if the owner of an estate of inheritance by his acts adopt and confirm the improper working, he cannot claim to be entitled *in præsenti* to the moneys arising from them; but will only be entitled to them after the death of the tenant for life; and the tenant for life will, during his life, be entitled to the income.[2]

mode of dealing.

Owner of inheritance adopting working.

(γ) *Injunction.*

In addition to his other remedies, the remainderman or reversioner may have an injunction.[3] And if there be no other remainderman *in esse* except a remainderman for life, an injunction may be granted at his instance.[4] So if A. be entitled for life, remainder to B. for life, remainder to C. in fee or tail; and A. commit waste; C. may have an injunction.[5] So a ground landlord may have an injunction to restrain waste.[6] And trustees to preserve contingent remainders may have an injunction to restrain waste committed by a tenant for life who is either himself the remote remainderman,[7] or who acts collusively with the remote remainderman.[8] And in such cases an intermediate remainderman, even if impeachable for waste, has a similar remedy.[9] And it is not necessary for a plaintiff to wait until waste is actually committed. He may obtain an injunction upon a threat to commit it.[10] Before, however, an interlocutory injunction will be granted to restrain the working of mines, the working of

Injunction.

Reluctance to grant interlocutory injunction.

[1] See Williams *v.* Bolton, 1 Cox. 72: Powlett *v.* Bolton, 3 Ves. 374.

[2] See Gresley *v.* Mousley, 3 De G. F. & J. 433.

[3] Flamang's Case, 7 Ves. 308; Viner *v.* Vaughan, 2 Beav. 466; Ferrand *v.* Wilson, 4 Ha. 388; Coppinger *v.* Gubbins, 3 J. & L. 397 (observed upon in Doherty *v.* Allman, 3 App. Cas. 734). For the form of the injunction, see Viner *v.* Vaughan, *u. s.*

[4] See the timber cases of Perrot *v.* Perrot, 3 Atk. 94; Davies *v.* Leo, 6 Ves. 787; Birch-Wolfe *v.* Birch, 9 Eq. 683.

[5] See Tracy *v.* Tracy, 1 Vern. 23; Garth *v.* Cotton, 1 L. C. 785; Farrant *v.* Lovel, 3 Atk. 723.

[6] See Farrant *v.* Lovel, *u. s.*

[7] See Perrot *v.* Perrot, *u. s.*; Birch-Wolfe *v.* Birch, *u. s.*

[8] Garth *v.* Cotton, 1 L. C. 757, 759, 769, 770, 776, 777; Birch-Wolfe *v.* Birch, *u. s.*

[9] Perrot *v.* Perrot *u. s.*; Birch-Wolfe *v.* Birch, *u. s.*

[10] See Gibson *v.* Smith, 2 Atk. 182.

which has been actually commenced, a clear title to relief must be established. The Court is otherwise reluctant to interfere; on account of the serious injury which may be caused.[1]

e. Improper Workings—Legal Waste—Loss of Remedies.

Stat. of Limitations.

The Statute of Limitations apparently begins to run, in cases of legal waste, as against a remainderman or reversioner, entitled to an estate of inheritance, and not under disability, from the time of the severance, and not from the death of the limited owner;[2] and operates as a bar after six years.[3] In cases where the waste is legal; but where, either on account of the wrongdoer acting in collusion with the remainderman, or on account of the wrongdoer being also the remainderman, or on account of there being no remainderman in fee or tail in esse, but only a remainderman for life, the remedy was, before the Jud. Acts, exclusively in equity; the statute apparently begins to run from the death of the limited owner.[4] According to one of such cases, the statute does not operate except after a lapse of twelve years from the death of the limited owner;[5] but, in another case, it was laid down, that the statute operated after a lapse of six years.[6] The doctrine, that the statute should not operate as a bar except after a lapse of twelve years appears to have proceeded on the assumption, that a portion of the inheritance

[1] See Clavering *v.* Clavering, 2 P. Wms. 388, Mosely, 223. See also Filewood *v.* Palmer, Mosely, 171; Anon., Amb. 209; and cf. Grey *v.* Northumberland, 13 Ves. 236, 17 *ib.*, 283; Birmingham Canal Co. *v.* Lloyd, 18 Ves. 516; Field *v.* Beaumont, 1 Swanst. 208; Hilton *v.* Granville, 1 Cr. & Ph. 297; Wheatley *v.* Westminster Brymbo Coal Co., 9 Eq. 551, 552. As to prevention of waste under 23 & 24 Vict. c. 154 (Ireland), see ss. 35, *et seq.*

[2] See the timber cases of Gent *v.* Harrison, Joh. 517, 526; Seagram *v.* Knight, 2 Ch. 628; Higginbotham *v.* Hawkins, 7 Ch. 676. But in case it should happen that the wrongdoer should become the personal representative of the injured party, the running of the statute will be suspended during the administration; the hand to receive, and the hand liable to account, being the same: see Seagram *v.* Knight, *u. s.*

[3] Ferrand *v.* Wilson, 4 Ha. 388; Seagram *v.* Knight, *u. s.*; Higginbotham *v.* Hawkins, *u. s.*; Elias *v.* Griffith, 8 Ch. D. 528.

[4] See the timber cases of Harcourt *v.* White, 28 Beav. 303; Birch-Wolfe *v.* Birch, 9 Eq. 683.

[5] Harcourt *v.* White, *u. s.*, 308, *per* Lord Romilly; 37 & 38 Vict. c. 57.

[6] Birch-Wolfe *v.* Birch, *u. s.*, *per* James, V.-C.

had been filched away, and that the same rule ought to apply to a claim to have it restored as would apply to a claim to the land itself.[1] But the more modern decisions regard all cases of wrongful working (whether constituting waste or otherwise) as cases in which portions of the inheritance have been, by severance, converted into chattels; and in which the claim made by the injured party is a claim either to chattels, or to the proceeds of them.[2] If, however, it be a fact, that, in any case of waste, the statute would now be held not to operate until twelve years had elapsed, it seems also to be the fact, that delay may be a fatal bar to relief, independently of the statute.[3] Relief may be also barred by acquiescence.[4] Where a landlord lay by, and permitted a tenant impeachable of waste to expend large sums on a bog with a view to cutting it, he was refused an injunction.[5]

Delay.

Acquiescence.

However, where the remedy is barred, it is only barred as respects the chattels actually severed and abstracted. For example, improper workings, for however long a period, by a tenant for life or years, will not create a right to continue them; or disentitle the reversioner or remainderman, when he pleases, to interpose and prevent the continuance.[6]

Bar only in respect of severed chattels.

f. Equitable Waste.

A tenant for life or years, without impeachment of waste, cannot, *primâ facie*, commit equitable waste.[7] He is bound to work with due care and attention to the interests of those who come after.[8] In a case, therefore, where a lessee for years was unimpeachable of waste, it was held, that he was not justified

Equitable waste.

[1] See the timber case of Leeds *v.* Amhurst, 2 Ph. 117, *per* Lord Cottenham.

[2] In which case the Act applying would be 21 Jac. 1, c. 16. See the timber cases of Seagram *v.* Knight, 2 Ch. 628; Birch-Wolfe *v.* Birch, 9 Eq. 683; and see the law as to breaking bounds, *post*, Chap. XXII., Sect. 2. Cf. Port *v.* Turton, 2 Wils. 172.

[3] See Harcourt *v.* White, 28 Beav. 303; where the bill was filed at the end of 20 years, less two days, after the death of the wrongdoer.

[4] See Leeds *v.* Amhurst, 2 Ph. 117.

[5] Burroughes *v.* Hayes, Hay. & Jo. 597.

[6] Courtown *v.* Ward, 1 Sch. & L. 8; Elias *v.* Griffith, 8 Ch. D. 521, 524, 525.

[7] See Vane *v.* Lord Barnard, 2 Vern. 738.

[8] See Rowe *v.* Wood, 2 J. & W. 556, *per* Lord Eldon.

Remedies.

in digging all the soil of a field for bricks, as this would be, in effect, destroying the field.[1] A person, who commits equitable waste, is subject to the same liability to pay damages, or to account, as a person who commits legal waste.[2] The decisions are conflicting as to the manner in which, where a tenant for life or years commits equitable waste, the severed chattels, or the amount to be accounted for, should be dealt with. According to some authorities, the severed chattels, or the amount to be accounted for, should be dealt with in the same manner as if the improper working had been legal waste:[3] but, according to others, should, in all cases, strictly follow the uses of the settlement; accumulations being made until the death of the wrongdoer, and (in the event of his being succeeded by a tenant for life or years) the income from his death being paid to such tenant for life or years.[4] A person, who commits equitable waste, may be restrained by injunction.[5] In cases of equitable waste the Statute of Limitations apparently begins to run, not from the time of the severance, but from the death of the limited owner;[6] and, according to decision, does not operate as a bar except after a lapse of twelve years.[7]

Stat. of Limitations.

Sect. 3.—Workings—Reversioner or Remainderman.

Reversioner or remainderman.

Under no circumstances, not even where the tenant for life or years has no right to work,[8] is the reversioner or remainderman entitled to do so; either to the prejudice of the tenant for life or years;[9] or, by acting in collusion with the latter, to the prejudice of a subsequent remainderman.[10] The interest of the

[1] London *v.* Web, 1 P. Wms. 527.

[2] *Ante*, p. 56.

[3] Ormond *v.* Kynnersley, Butler *v.* Kynnersley, 7 L. J. (O. S.) Ch. 150; 8 *ib.* 67; S. C. 5 Madd. 369; 2 S. & S. 15; 2 Bli. N. S. 385; Lushington *v.* Boldero, 15 Beav. 1.

[4] Lansdowne *v.* L., 1 Madd. 140; Wellesley *v.* W., 6 Sim. 503: and see the law as laid down by Jessel, M. R., in Honywood *v.* H., 18 Eq. 311.

[5] London *v.* Web, 1 P. Wms. 527.

[6] See the timber case of Leeds *v.* Amhurst, 14 Sim. 357; 2 Ph. 117.

[7] *Ib.*, 37 & 38 Vict. c. 57. But, semble, this is not now law: see *ante*, pp. 62, 63.

[8] See *ante*, pp. 48, 51.

[9] See Dickin *v.* Hamer, 1 Dr. & Sm. 295: see also the timber case of Bishop *v.* Bishop, 10 L. J. Ch. 302.

[10] See the timber cases of Evelin, 2 Freem. 53; Fleming *v.* Carlisle, 1 L. C. 786.

reversioner or remainderman in the mines and quarries is the same as his interest in the other parts of the inheritance—a reversion or remainder, strictly so called; and he cannot exercise his rights by anticipation. And if during the possession of a tenant for life or years impeachable of waste, minerals are severed from the inheritance by the act of the reversioner or remainderman, the tenant for life or years is entitled to have the proceeds invested, and the income paid to him during his tenancy.[1] So, if no actual assignment has been made to a lady for her dower,[2] and the remainderman works new mines or quarries in lands in respect of which she is dowable without her consent, although she is not entitled to any interest in the corpus, she is entitled, *primâ facie*, to receive one-third of the income derivable from the produce.[3] A tenant for life or years may, however, by acquiescing in the exercise of his rights by anticipation by a reversioner or remainderman, disentitle himself to the remedy which he would otherwise have.[4] Where on an Irish tenancy from year to year a notice to quit is given by the landlord with a view to the use of land for turbary; or the opening or working of any coal, ironstone, limestone, or other mineral, or of a stone quarry, clay, sand, or gravel pit, or the construction of any incidental works or buildings; or the obtaining of brick earth, gravel, or sand; and the notice to quit so states; it is no objection to the notice that it relates to part only of the holding. But the tenant is entitled to compensation, and to a proportionate reduction in his rent.[5]

Mode of dealing with proceeds.

Acquiescence.

Irish leases.

SECT. 4.—WORKINGS—TRUSTEES.

Trustees have no right, *primâ facie*, of their own motion, to work mines or quarries. However, the Conv. Act, 1881,[6] contains provisions empowering trustees, in certain cases, to do so. If and so long as any person, who, but for those provisions,

Trustees—Conv. Act, 1881.

[1] See and consider Bishop *v.* Bishop, 10 L. J. Ch. 302; Dickin *v.* Hamer, 1 Dr. & Sm. 284.

[2] See *post*, Chap. XIII., *d.* (*a*).

[3] See Dickin *v.* Hamer, *u. s.* 298, *per* Kindersley, V. C.: see also the timber case of Bishop *v.* Bishop, *u. s.*

[4] See Dickin *v.* Hamer, *u. s.*

[5] 39 & 40 Vict. c. 63, s. 3.

[6] 44 & 45 Vict. c. 41.

would be beneficially entitled to the possession of land, is an infant, and being a woman is also unmarried, the trustees appointed for that purpose by the settlement (if any); or, if there are none so appointed, the persons (if any) who are for the time being trustees, with power of sale of the settled land or of part thereof, or with power of consent to or approval of the exercise of such a power of sale; or, if there are none, any persons appointed as trustees for that purpose by the Court, on the application of a guardian or next friend of the infant; may enter into and continue in possession of the land. And such trustees may continue the working of mines, minerals, and quarries, which have usually been worked. But, unless the infant is entitled without impeachment of waste, they cannot work new mines or quarries. For, where the infant is impeachable for waste, they are not entitled to commit waste. They may apply any net income from the workings for the maintenance, education, or benefit of the infant, or they may pay it to the parent or guardian to be applied for the same purposes; and the residue of the income must be applied according to the provisions of the Act.[1]

Express powers.

However, in all proper cases, an instrument under which mines or quarries are settled, whether it be a strict settlement, or a settlement containing a trust for sale and a power to postpone it, or a settlement containing a power of sale, should contain express powers as to their working and management. And the trustees (if any) of the settlement should in general be made the donees of the powers. By this means the preference of one of the beneficiaries to another will be best avoided; the trustees being bound to act fairly to both.[2] Indeed, during minorities the trustees should always be made the donees.[3] Where trustees are made the donees of working powers, the property in the machinery and stock belonging to the colliery in question should be vested in them; with powers to repair and replace them, and on trust to permit them to be used in the working, and with power to sell them.[4]

[1] S. 42.

[2] See Wightwick *v.* Lord, 6 H. L. Cas. 236; Miller *v.* Miller, 13 Eq. 267, 268; Thursby *v.* Thursby, 19 *ib.* 395, 413. For the form of a power to trustees to carry on mining operations, see Dav. 3, pp. 1126 *et seq.*

[3] For the form of a power, see Dav. 3, p. 1082.

[4] For the form, see *ib.* 1132 *et seq.*

SECT. 5.—USER.

a. Ordinary Tenancies in Fee.

Containing chamber—generally.

The owner in fee simple or tail of lands containing mines or quarries has an absolute right to use them, and the chamber which incloses them, and the space or shell which the working of the minerals creates, and the subsoil generally, in any manner he thinks proper.

Grant in fee excepting mines.

And where the owner in fee simple of lands grants them, excepting the underlying mines, he has, with respect to those mines, a similar right. And as, by excepting the mines, he, *ipso facto*, excepts the chamber which incloses them,[1] he has a similar right with respect to that chamber, and with respect to the space or shell which the working of the minerals creates. The containing chamber is not purely and solely a species of property which can only be made profitable by the removal of the inclosed minerals; with the incidental[2] rights of using all proper means for obtaining them.[3] It is a species of property which is as free as other property from restrictions as to its mode of user.[4] The grantor may, therefore, use the space or shell created by his previous working of the inclosed minerals as a thoroughfare for the carriage of minerals gotten out of his adjoining land.[5] And if, instead of previously working the inclosed minerals, and then utilising the space or shell thereby created, he prefers to cut a passage through those minerals for the express purpose of using it, and to accordingly use it, as a thoroughfare for the carriage of other minerals, he is entitled to do so.[6] And what he may do himself, he may, by the grant of wayleaves, authorise an adjoining owner, or any number of

[1] See *ante*, p. 10.

[2] See *post*, Chap. XIV., Sect. 3, *a* (a).

[3] See Hamilton *v.* Graham, L. R. 2 Sc. & D. 166, *per* Lords Hatherley, Westbury, and Colonsay. Lord Chelmsford inclined to the opposite view: see pp. 171, 172, 175, 176.

[4] See Proud *v.* Bates, 34 L. J. Ch. 406, 411; Hamilton *v.* Graham, L. R. 2 Sc. & D. 166; Eardley *v.* Granville, 3 Ch. D. 826, 835: see also Bowser *v.* Maclean, 2 De G. F. & J. 420; Ballacorkish, &c. Co. *v.* Harrison, L. R. 5 P. C. 49, 62; Ramsay *v.* Blair, 1 App. Cas. 701.

[5] See Proud *v.* Bates, 34 L. J. Ch. 411; Hamilton *v.* Graham, L. R. 2 Sc. & D. 166, 176, 179, 180.

[6] See *ib.*

adjoining owners, to do.[1] And his rights in respect of ventilation and drainage are, of course, as unlimited as his rights in respect of transport.[2] And if any water is found in his mines, or percolates into them, he is, as owner of the mines, entitled to appropriate such water and use it in any way he pleases.[3] Inasmuch, however, as an exception of the underlying mines is not equivalent to an exception of the subsoil generally,[4] rights of user founded upon an exception of underlying mines are exclusively exercisable within that portion of the subsoil which actually consists of mines, and are not exercisable within the intervening or surrounding soil or strata.[5] Similar principles apply where the owner of land grants it by way of lease, excepting the mines; or where he grants the mines in fee simple, and excepts the surface; or where a severance in fee simple is effected by an Act of Parliament; or where the subject-matter of a grant, or an exception, are "veins," or "seams," or "quarries."[6]

Limits of right.

Other modes of severance.

Where, however, according to the true construction of the instrument of severance, there is a grant or exception of minerals only, different principles apply. In no such case does the containing chamber form any part of the grant or exception. In no such case, therefore, is the mineral owner entitled to use the minerals for the purpose of carrying through them the minerals gotten in an adjoining mine, or for the purpose of ventilating or draining an adjoining mine. And, if a space is created by the partial working of such minerals, he can only use such space for necessary purposes incident to the working of the remaining minerals. And when the minerals are worked out, his right to use the shell, which remains, ceases altogether.[7]

Grant or exception of minerals.

[1] See Hamilton *v.* Graham, L. R. 2 Sc. & D. 176.

[2] See *ib.* 180.

[3] See Acton *v.* Blundell, 12 M. & W. 354; Ballacorkish, &c. Co. *v.* Harrison, L. R. 5 P. C. 62, 63. See, however, Chasemore *v.* Richards, 2 H. & N. 192, *per* Coleridge, J.; 7 H. L. Cas. 385, *per* Lord Wensleydale.

[4] See *ante*, p. 20.

[5] See Ramsay *v.* Blair, 1 App. Cas. 704.

[6] See *ante*, pp. 10, 11.

[7] See and consider Bowser *v.* Maclean, 2 De G. F. & J. 415; Proud *v.* Bates, 34 L. J. Ch. 406; Hamilton *v.* Graham, L. R. 2 Sc. & D. 166; Ballacorkish, &c. Co. *v.* Harrison, *ib.* 5 P. C. 49; Eardley *v.* Granville, 3 Ch. D. 826, 834, 835; Ramsay *v.* Blair, 1 App. Cas. 701. See *ante*, p. 18.

Proud v. *Bates*[1] illustrates the principles in question. There a lease made by the lord of a manor of waste land of the manor, then recently inclosed by the lessee, contained an exception of mines and quarries, with full power to win and work the same, with free wayleave and passage to, from, and along the same, on foot or on horseback, and with all manner of carriages. A way, available for the carriage of minerals, lay exclusively within the excepted mines. It was not, however, sufficiently high to admit of a horse moving his head, whilst the vehicle to which he was attached was being backed. Under these circumstances the lessor chipped off a part of the rock, which lay above the excepted mines; and claimed a right under the reserved power to carry along the way in its altered state, as well minerals worked within the excepted mines, as also minerals within the manor, although not under the demised property. It was contended, that not merely could this claim not be sustained with respect to the way in its altered state, but that it could not be sustained with respect to the way in its original condition. The first contention failed for reasons which will be stated hereafter.[2] The second also failed; the Court holding, that the lord had an absolute right to do what he pleased with the excepted mines, and had, therefore, a right to carry through them minerals from wherever gotten. So in *Hamilton* v. *Graham*.[3] There, a feu charter contained an exception in favour of the Duke of Hamilton and his heirs of all coal and limestone within the lands granted, with full working powers. The duke made a passage through the excepted coal, and used it for the conveyance of other coal and limestone, to which he had a similar right under adjoining lands. It was held, that this was a proper user of the passage.[4]

Proud *v.* Bates.

Hamilton *v.* Graham.

[1] 34 L. J. Ch. 406.

[2] *Post*, Chap. XVI., Sect. 2, *b* (γ).

[3] L. R. 2 Sc. & D. 166.

[4] See also Bowser *v.* Maclean, 2 De G. F. & J. 420; Ballacorkish, &c. Co. *v.* Harrison, L. R. 5 P. C. 49; Ramsay *v.* Blair, 1 App. Cas. 701; Eardley *v.* Granville, 3 Ch. D. 826.

b. Life Tenancies and Leaseholds—Reversions and Remainders.

Containing chamber—generally.

It has been already seen, that where a person becomes the tenant for life or years, or from year to year, or even the tenant at will, of lands, he becomes entitled to the right of possession of the subsoil generally;[1] and that the same principle applies to that particular portion, which consists of mines or quarries; to the chamber which incloses those mines or quarries; and to the space or vacuum created by their partial or total working.[2] It follows, that, during the duration of his interest, a tenant for life or years, or from year to year, or at will, of lands has, speaking generally, as absolute a right to use as he thinks proper the mines or quarries beneath or within such lands, the containing chamber, the space or vacuum created by his workings, and the subsoil generally, as if he were the owner in fee simple.[3]

Lease excepting surface.

And where the owner of land grants the mines or quarries therein by way of lease, and excepts the surface, the lessee must have a similar right with respect to those mines or quarries, the containing chamber, and the space or vacuum which the working of the minerals creates.[4] No doubt it appears to have been stated in two cases of mining leases, that the lessee did not, according as he worked the minerals, acquire any interest in the space or vacuum thereby created.[5] But in one of them[6] it was probably intended to confine the dictum to a proprietary (as compared with a possessory) interest: for a stranger, who was using the vacuum as an aircourse, was, at the instance of the lessee, restrained from continuing to do so. Subject, however, to this, the dicta in question cannot, it is submitted, be supported.[7] It is

[1] See *ante*, p. 32.

[2] See *ante*, p. 33.

[3] See Lewis *v.* Branthwaite, 2 B. & Ad. 437; Keyse *v.* Powell, 2 E. & B. 144; in connexion with Eardley *v.* Granville, 3 Ch. D. 826.

[4] See and consider Milne *v.* Taylor, 16 L. T. 172. The lessee of an exhausted mine "might use the mine for any other purpose — to store goods in, for instance," *ib.*, *per* Alderson, B.

[5] See Powell *v.* Aikin, 4 K. & J. 358, *per* Wood, V. C., where the operative words (so far at least as appears from the report), were "mines, veins, and seams of coal;" Spoor *v.* Green, L. R. 9 Exch. 109, *per* Cleasby, B., where the operative words were "veins or seams of coal."

[6] Powell *v.* Aikin, *u. s.*

[7] See and consider Jegon *v.* Vivian,

impossible to indicate any peculiarity in a mining or quarrying lease strictly so called, which should in the above respect distinguish it from a lease of land which happens to contain a mine or quarry.

6 Ch. 742, 750, 758; *post*, Chap. XI., Sect. 4. As to what the operative words in Powell *v.* Aikin and Spoor *v.* Green should *primâ facie* mean, see *ante*, pp. 9, 10, 11.

CHAPTER IV.

WORKINGS AND USER FOUNDED ON PROPERTY OR POSSESSION — MANORIAL AND CHURCH LANDS— LANDS SUBJECT TO MORTGAGE OR CONTRACT— LANDS OF RAILWAY OR HARBOUR COMPANIES.

Sect. 1.—WORKINGS—COPYHOLDS AND CUSTOMARY FREEHOLDS.

a. Copyholds.—Open Mines or Quarries.[1]

Copyholder may work open mines or quarries.

A COPYHOLDER of a manor, having obtained by his grant a grant of the subsoil of his tenement, with all the mines and quarries therein contained,[2] may, if the mines or quarries were open at the date of the grant, dig them and take the profits.[3] On similar grounds, if stones fall by accident on a copyholder's land, after it has become such, they belong to the copyholder.[4]

b. Copyholder—New Mines or Quarries.[1]

Limited rights as respects new mines or quarries.

A copyholder is perhaps entitled to open and work new mines or quarries in a reasonable degree for repairs or personal use.[5] And a copyholder may, it is said, dig for marl: but he ought to lay the marl upon the same copyhold land, and not upon any other land.[6] However, the lord of a manor having, in general, the right of property in the mines and quarries in the copyhold tenements,[7] a copyholder cannot, in general, *primâ facie*, except under the above circumstances, open or work mines or quarries therein, which were unopened at the date of his grant.[8] For,

General disability in other respects —waste.

[1] As to open and new mines or quarries, see *ante*, pp. 22 *et seq.*

[2] *Ante*, p. 34.

[3] See and consider Peachy *v.* Somerset, 1 Str. 447, 454; Bourne *v.* Taylor, 10 East, 189, 202, 203.

[4] Dearden *v.* Evans, 5 M. & W. 11.

[5] See and consider Heydon *v.* Smith, 13 Co. 68: and cf. the position of a tenant for life impeachable of waste. *ante*, p. 51.

[6] Pastor's Case, Winch, 8.

[7] *Ante*, p. 34.

[8] Winchester *v.* Knight, 1 P. Wms.

by so doing, he would commit an act of waste.[1] In a case where large masses of stone had fallen from time to time from certain overhanging cliffs upon the field of a copyhold tenement, and had thereby become partially imbedded in the soil; but there was no evidence to show, that any particular portion of them had fallen since the copyholder in question became such; it was, on similar grounds, held, that such stones were the property of the lord, and that the copyholder could not remove them for his own profit.[2] However, a copyholder may, for the sake of disencumbering his land, remove stones therefrom, even though such stones be not very small.[3]

Remedies for wrongful workings—forfeiture.

The remedy of forfeiture is open to the lord of a manor whose copyhold tenant wrongfully opens mines or quarries beneath or within the copyhold tenement.[4] The lord may also, in general, as having the right of property therein,[5] maintain an action to recover the minerals improperly worked;[6] or he may recover damages; or he may have an account.[7] And, of course, the death of the wrongdoer does not destroy the remedy.[8] However, where the lord of a manor stood by for a long period, and allowed copyholders, without objection on his part, to open and work mines, and expend a large sum of money on mining operations, he was held disentitled to an account prior to the filing of his bill.[9] Mining operations are so uncertain, that if a party, who may be entitled to relief, does not apply for it promptly, it may be

Action to recover—damages and account.

406; Bourne *v.* Taylor, 10 East, 189, 196; Rowe *v.* Brenton, Conc. 313; Dearden *v.* Evans, 5 M. & W. 11; Cuddon *v.* Morley, 7 Ha. 202; Bowser *v.* Maclean, 2 De G. F. & J. 419; Salisbury *v.* Gladstone, 9 H. L. C. 708; Hext *v.* Gill, 7 Ch. 713; Eardley *v.* Granville, 3 Ch. D. 826, 833.

[1] Eardley *v.* Granville, *u. s.* The dictum to the contrary in Rutland's Case, 1 Sid. 152, cannot be supported.

[2] Dearden *v.* Evans, 5 M. & W. 11.

[3] *Ib.*

[4] Hanmer *v.* Chance, 4 De G. J. & S. 636, 637; Eardley *v.* Granville, 3 Ch. D. 833: see Parrott *v.* Palmer, 3 M. & K. 639.

[5] *Ante*, p. 34.

[6] Trover formerly lay: see Winchester *v.* Knight, 1 P. Wms. 406; Parrott *v.* Palmer, 3 M. & K. 644; Eardley *v.* Granville, *u. s.* 833: cf. Dearden *v.* Evans, 5 M. & W. 11.

[7] See Winchester *v.* Knight, 1 P. Wms. 406; Parrott *v.* Palmer, 3 M. & K. 644; Portland *v.* Hill, 2 Eq. 765. Trespass formerly lay: or, if the minerals had been sold, an action for money had and received. An account would not, however, before the Judicature Acts, have lain, unless possession by the lord had been shown: see Parrott *v.* Palmer, 3 M. & K. 645.

[8] See Winchester *v.* Knight, 1 P. Wms. 407.

[9] See Parrott *v.* Palmer, 3 M. & K. 643.

Injunction.

inequitable to give it to him.[1] The lord may also, in general, have an injunction to restrain the future wrongful working.[2] However, upon a similar principle to that applied in the case of an account,[3] where the lord has stood by for a long period, and allowed copyholders to expend a large sum on mining operations, he will not be allowed an injunction, but will be left to his remedy in damages.[4]

c. Lord—New Mines or Quarries.[5]

General disability to work new mines or quarries.

The possession of all mines and quarries in the copyhold tenements being in the copyholders,[6] the lord has not, *primâ facie*, any right to enter upon a copyhold tenement in order to bore for or work any new mines or quarries therein.[7] And, as it has been already seen,[8] that the copyholder is, *primâ facie*, under a similar disability, it follows that, where there is no custom in a manor to regulate the rights of the parties, neither the copyholder without license of the lord, nor the lord without license of his copyholder can open and work new mines or quarries beneath or within the copyhold tenement.[9]

Remedies for wrongful workings—damages and account.

A copyholder may, in general, recover damages against his lord for wrongfully entering upon the copyhold, and working the mines or quarries;[10] or he may have an account.[11] And

[1] See Parrott *v.* Palmer, 3 M. & K. 643.

[2] See Parrott *v.* Palmer, 3 M. & K. 632; Cuddon *v.* Morley, 7 Ha. 207; Green. Hosp. *v.* Blackett, 12 Jur. 151; Portland *v.* Hill, 2 Eq. 765: and cf. Richards *v.* Noble, 3 Mer. 673, overruling Dench *v.* Bampton, 4 Ves. 700.

[3] See *ante*, p. 73.

[4] Parrott *v.* Palmer, *u. s.* For the form of the account and injunction, see Portland *v.* Hill, Set. 202.

[5] As to new mines or quarries, see *ante*, pp. 22 *et seq.*

[6] *Ante*, p. 34.

[7] See Player *v.* Roberts, Sir W. Jones, 243; Gilb. on Ten. 327; Townley *v.* Gibson, 2 T. R. 707; Grey *v.* Northumberland, 13 Ves. 236, 17 *ib.* 282; Bourne *v.* Taylor, 10 East, 189; Rowe *v.* Brenton, Conc. 313, 8 B. & C. 766; Whitechurch *v.* Holworthy, 4 M. & S. 340; Salisbury *v.* Gladstone, 9 H. L. C. 708; Portland *v.* Hill, 2 Eq. 780; Hext *v.* Gill, 7 Ch. 713; Eardley *v.* Granville, 3 Ch. D. 832; A.-G. *v.* Tomline, 5 Ch. D. 750.

[8] *Ante*, p. 72.

[9] See Winchester *v.* Knight, 1 P. Wms. 406; Bourne *v.* Taylor, *u. s.*; Rowe *v.* Brenton, *u. s.*; Hilton *v.* Granville, 1 Cr. & Ph. 294; Salisbury *v.* Gladstone, *u. s.*; Aspden *v.* Seddon, 1 Exch. D. 510.

[10] Trespass formerly lay: see Player *v.* Roberts, *u. s.*; Bourne *v.* Taylor, *u. s.*; Eardley *v.* Granville, 3 Ch. D. 833.

[11] A.-G. *v.* Tomline, *u. s.*

these remedies are open to him, although he may be only a reversioner.[1] It has been decided, that the measure of damages to which a copyholder is entitled, whose lord wrongfully enters upon the copyhold, and works and gets the minerals therein, is the gross amount produced by their sale, less the expenses of the working and of the sale, and less such a sum by way of profit as would have induced a third person to undertake the working.[2] But the decision was apparently disapproved of when the same case was before the Court of Appeal; as being too favourable to the copyholder.[3] A copyholder may also, in general, whether he is entitled in possession or reversion, have an injunction to restrain a wrongful working.[4] Before, however, an interlocutory injunction will be granted, where the working of a mine has been actually commenced, the copyholder must show clearly that the lord has no right to work. Except in clear cases, the Court is reluctant to restrain the further working of a mine, the working of which has been actually commenced; on account of the serious injury and inconvenience which may be thereby caused.[5]

Measure of damages.

Injunction.

d. Customary Freeholds.

The right of property in mines or quarries beneath or within customary freeholds being in the lord, and the possession being in the tenant,[6] precisely the same rights and disabilities exist with respect to the working of the mines and quarries as exist with respect to the working of mines and quarries in copyhold tenements.[7]

Customary freeholds.

[1] A.-G. *v.* Tomline, 5 Ch. D. 761.

[2] See *ib.* 750.

[3] *Ib.* 15 Ch. D. 150, 153, 154.

[4] Grey *v.* Northumberland, 13 Ves. 236, 17 *ib.* 282; A.-G. *v.* Tomline, 5 Ch. D. 750.

[5] Grey *v.* Northumberland, *u. s.*: see also *ante*, p. 62, n. [1], and other cases there cited.

[6] *Ante*, p. 35.

[7] See Winchester *v.* Knight, 1 P. Wms. 406; Portland *v.* Hill, 2 Eq. 765, 777: see as to copyholds, *ante*, pp. 72 *et seq.*

Sect. 2.—WORKINGS—WASTES.

Lord has general right to work.

The lord of a manor, having the right of property in the mines and quarries beneath or within the waste or common of the manor,[1] may, *primâ facie*, open mines, or dig brick earth, gravel, marl, or loam, therein.[2] And he may work or dig either for his own use or for the purpose of sale.[3] And he may, it would seem, authorise any other person, not being a lessee, to do so.[4] His rights in these respects proceed from his right of property in the soil, and are independent of the Statute of Merton.[5] Indeed, they are outside the purview of the statute; the space produced by the digging not being inclosed.[6] The lord cannot, however, do anything destructive of common rights.[7] He must, therefore, *primâ facie*, in working his mines or quarries, or digging his earth or gravel, leave sufficient common for his commoners.[8] And he is probably liable, if his commoners' beasts, for want of sufficient fences, fall into pits dug by him in the waste.[9] But the fact, that, for any substantial period, there has been a sufficiency of common, is *primâ facie* evidence, that an actual sufficiency has been left.[10] And, in every case, the onus lies on the commoners to show, that the lord is availing himself unduly of his rights.[11]

But must leave sufficient common.

[1] *Ante*, p. 36.

[2] See Filewood *v.* Palmer, 5 Vin. Abr. p. 8, § 33; Mosely, 172; Place *v.* Jackson, 4 D. & Ry. 318; Hall *v.* Byron, 4 Ch. D. 667, 675; Robinson *v.* Duleep Singh, 11 Ch. D. 798, 815, 830, 831. The dicta to the contrary in Bullen and Sheene's Case, Godb. 343; Geo. *v.* Cother, Sid. 106; and Buccleuch *v.* Wakefield, L. R. 4 H. L. 410; cannot be supported.

[3] Hall *v.* Byron, *u. s.* 680.

[4] Lascelles *v.* Onslow, 2 Q. B. D. 433, 450.

[5] 20 H. 3, c. 4: see Hall *v.* Byron, *u. s.* 675; Robinson *v.* Duleep Singh, *u. s.* 831.

[6] Robinson *v.* Duleep Singh, *u. s.* 831.

[7] See 3 Cruise, 85.

[8] See Filewood *v.* Palmer, Mosely, 172; Melm. MSS. E. 53 Linc. Inn Library, "The lord is absolutely entitled to the mine, provided he leaves sufficient common." See also Arlett *v.* Ellis, 7 B. & C. 346; Wakefield *v.* Buccleuch, 4 Eq. 613; Buccleuch *v.* Wakefield, L. R. 4 H. L. 407; Hall *v.* Byron, *u. s.*; Lascelles *v.* Onslow, *u. s.*, 449; Robinson *v.* Duleep Singh, *u. s.*, 830, 831.

[9] See Bullen and Sheene's Case, *u. s.*; Robinson *v.* Duleep Singh, 11 Ch. D. 831, 832.

[10] See Robinson *v.* Duleep Singh, 11 Ch. D. 830.

[11] Hall *v.* Byron, 4 Ch. D. 667, 680, *per* Hall, V. C. The onus would be upon the lord, if the act complained of were approvement by him: see *post*, Chap. VII., Part B., Sect. 2, *a*.

An injunction will issue, where the lord wrongfully claims the right, although he denies any present intention, to do the act complained of.[1] The County Court has jurisdiction to grant an injunction, subject to an appeal by any person aggrieved to the High Court; but the jurisdiction does not abridge or interfere with other existing remedies.[2]

Injunction where workings wrongful.

SECT. 3.—WORKINGS—CHURCH LANDS.

a. Bishop—Dean and Chapter—Prebendary.

Independently of the Act 23 & 24 Vict. c. 124, the rights of an archbishop or bishop in respect of mines or quarries beneath or within the ancient lands of his see are these:—He may dig stones for the purpose of reparation;[3] or he may sell the stones, provided he applies the money in repairs.[4] And he may work mines or quarries lawfully open at the time when his title commenced, and apply the produce to his own use.[5] But he cannot open or work new mines or quarries.[6] However, the above rights can hardly be exercised at the present day. For the Act 23 & 24 Vict. c. 124, provided, that, on every avoidance of the see of any archbishop or bishop in England after the passing of the Act, the lands of the see (with certain exceptions) should vest absolutely in the Eccl. Comms.;[7] and that, as soon as possible thereafter, lands sufficient to secure the statutory income

Archbishop or bishop.

[1] Hall *v.* Byron, 4 Ch. D. 679, 680. For the form of such injunction, and of a decree quieting the title of commoners to rights of common, see *ib.* 680, 681. See also Comms. of Sewers *v.* Glasse, 19 Eq. 134, 165; Set. 216, 217.

[2] 39 & 40 Vict. c. 56, s. 30.

[3] See the timber cases of Stockman *v.* Whither, 1 Roll. Rep. 86; Salisbury's Case, Godb. 259; Jefferson *v.* Durham, 1 Bos. & P. 132; Herring *v.* St. Paul's, 3 Swanst. 509.

[4] His right in this respect must be the same as that of a parson, as to which see *post*, p. 79.

[5] His right in this respect cannot be less than that of a parson, as to which see *post*, p. 79.

[6] Knight *v.* Mosely, Amb. 176. See also the timber cases of Bishop of Durham, 35 Ed. 1, Rot. Parl., vol. i., p. 198, no. 46 (cited in Liford's Case, 11 Co. 49 a; and in Jefferson *v.* Durham, 1 Bos. & P. 109); Stockman *v.* Whither, *u. s.*; Salisbury's Case, *u. s.*; Bradley *v.* Stratchy, Barn. 399, 400; Herring *v.* St. Paul's, *u. s.* As to open and new mines or quarries, see *ante*, pp. 22 *et seq.*

[7] S. 2.

should be assigned as an endowment to such archbishop or bishop ;[1] and that, on the request of any archbishop or bishop, a like arrangement might be made before an avoidance.[2] And, with respect to the lands so assigned as an endowment, certain powers were created, which did not, except through the medium of the grant of a lease,[3] include powers of working. If an archbishop or bishop improperly works mines or quarries, he may be deprived of his see :[4] and a prohibition or injunction may be obtained against him by the Metropolitan, or an injunction on an information by the Attorney-General.[5]

Deprivation—prohibition or injunction.

Where lands are vested in a Dean and Chapter the fee simple belongs in strictness to the Dean and Chapter ; and, at common law, they had a complete power to work all mines and quarries beneath and within such lands, and to apply the produce to their own personal benefit.[6] However, since the passing of the Acts known as the Restraining Acts[7] it has always been held, that a Dean and Chapter cannot dig stones in their lands ; or sell the stones except for repairs, or for the purpose of applying the money in repairs.[8] The inheritance is the inheritance of the Church, and the Dean and Chapter have no power to divide it amongst themselves.[9] And by the Act 31 & 32 Vict. c. 114, provisions are made for vesting, with the consent in writing of any Dean and Chapter in England under their common seal, and of the visitor of such Dean and Chapter, the estates of such Dean and Chapter, in the Ecclesiastical Commissioners for such consideration and on such terms as the Commissioners think reasonable ; and for assigning sufficient lands to such Dean and Chapter

Dean and Chapter.

[1] S. 3.

[2] S. 4.

[3] S. 8. See *post*, Chap. VIII., Sect. 5, *d.* (a).

[4] Phil. Eccl. Law, 1613, citing Bagg's Case, 11 Co. 98 b. See Liford's Case, *ib.*, 49 b. ; Salisbury's Case, Godb. 259 ; Jefferson *v.* Durham, 1 Bos. & P. 122 ; Herring *v.* St. Paul's, 3 Swanst. 510 ; Ross *v.* Adcock, L. R. 3 C. P. 664.

[5] Bradley *v.* Stratchy, Barn. 399, 400 ; Jefferson *v.* Durham, *u. s.* 131 ; Wither *v.* Winchester, 3 Mer. 427 ; Winchester *v.* Wolgar, 3 Swanst. 493 n.

[6] See Marlborough *v.* St. John, 5 De G. & Sm. 179, 180.

[7] 13 Eliz. c. 10 ; 13 Eliz. c. 20 ; 14 Eliz. c. 11 ; 14 Eliz. c. 14.

[8] Ross *v.* Adcock, L. R. 3 C. P. 664. See the timber cases of Wither *v.* Winchester, 3 Mer. 421, 427 ; Herring *v.* St. Paul's, 3 Swanst. 492, 510, 515 ; Marlborough *v.* St. John, 5 De G. & Sm. 179, 180.

[9] Herring *v.* St. Paul's, *u. s.* 509, *per* Sir T. Plumer.

as an endowment, in lieu of any annual sum payable to them by the Commissioners.[1]

A prebendary is punishable for waste.[2] In the Act 31 & 32 Vict. c. 114, provisions, similar to those with respect to the estates of Deans and Chapters, are contained with respect to estates of deaneries, canonries, prebends, and archdeaconries in England.[3] If a prebendary improperly works mines or quarries, a prohibition or injunction may be obtained against him by the patron.[4]

Prebendary.

Prohibition or injunction.

b. Parson—Open Mines or Quarries.[5]

A parson[6] may work open mines or quarries, and apply the produce to his own use.[7]

Parson may work open mines or quarries.

c. Parson—New Mines or Quarries.[5]

A parson may dig stones in his glebe lands for the purpose of repairs.[8] Or he may sell the stones for the purpose of applying the money in repairs actually about to be done, if the stones themselves cannot be conveniently used for that purpose.[9] But he cannot be allowed to work to an unlimited extent to provide a general repairing fund.[10] And, except for repairs, a parson cannot, *primâ facie*, of his own will, open and work new mines or quarries.[11]

Limited rights as respects new mines or quarries.

General disability in other respects.

[1] See ss. 3, 6.

[2] See the timber cases of Bradley *v.* Stratchy, Barn. 399; Acland *v.* Atwell, 2 Rolle's Abr. 813; 3 Swanst. 499 n.

[3] See s. 13.

[4] Bradley *v.* Stratchy, *u. s.*; Acland *v.* Atwell, *u. s.*

[5] As to open and new mines or quarries, see *ante*, pp. 22 *et seq.*

[6] Where glebe lands are vested in a parson or vicar, the inheritance is in abeyance. It is not, for instance, in the patron, or in the patron and ordinary: see Co. Litt. 340 a; Hoskins *v.* Featherston, 2 B. C. C. 552; Huntley *v.* Russell, 13 Q. B. 588. Nor is it in the parson or vicar: Marlborough *v.* St. John, 5 De G. & S. 179.

[7] Knight *v.* Mosely, Amb. 176; Huntley *v.* Russell, 13 Q. B. 572, 591; Marlborough *v.* St. John, *u. s.*; Bartlett *v.* Phillips, 4 De G. & J. 414; Ross *v.* Adcock, L. R. 3 C. P. 665.

[8] Knight *v.* Mosely, Amb. 176. See also the timber cases of Strachy *v.* Francis, 2 Atk. 217; Marlborough *v.* St. John, 5 De G. & Sm. 178; Sowerby *v.* Fryer, 8 Eq. 417, 422.

[9] *Ib.* See also the timber case of Wither *v.* Winchester, 3 Mer. 427, 428.

[10] Marlborough *v.* St. John, *u. s.* 178, 181; Sowerby *v.* Fryer, *u. s.* 422.

[11] Knight *v.* Mosely, Amb. 176; Marlborough *v.* St. John, 5 De G. & Sm. 179; Bartlett *v.* Phillips, 4 De G. & J. 414; Holden *v.* Weekes, 1 J. & H. 278; Ross *v.* Adcock, L. R. 3 C. P. 664. See also the timber cases of Liford's Case, 11 Co. 49 a; Saccar's Case, Moore, 917; Bradley *v.* Stratchy,

His position is that of a tenant for life impeachable of waste.[1] And it is clear, that the consent of the patron alone will not enable him to do so.[2] And, although he had, at common law, with the consent of the patron and the ordinary;[3] or (if there were both a patron paramount and an immediate patron), with the consent of the patron paramount, the immediate patron, and the ordinary;[4] an unlimited power of alienating the glebe lands, and, *à fortiori*, an unlimited power of opening new mines and quarries; it is, since the passing of the Restraining Acts,[5] doubtful whether, even with the consent of his patron or patrons, and ordinary, he can open new mines or quarries.[6] If it be the law, that a parson may, with the consent of the patron or patrons and the ordinary, open and work new mines or quarries, or authorise another person so to do, such consent must be shown to have been obtained, and will not easily be presumed.[7] If it be the law, that a parson may not, even with the consent of the patron or patrons and the ordinary, open and work new mines or quarries, the difficulty cannot, it is submitted, be overcome by obtaining the sanction of the Court; the Court not having, it is submitted, any authority to give such sanction.[8]

Remedies for wrongful workings—action to recover—account and damages.

The patron may maintain an action to recover minerals improperly worked by a parson or vicar.[9] And the better opinion

Barn. 399; nom. Strachey *v.* Francis, 2 Atk. 217; Acland *v.* Atwell, 2 Rolle's Abr. 813; 3 Swanst. 499 n.; Sowerby *v.* Fryer, 8 Eq. 417. The dictum to the contrary in Rutland's Case, 1 Lev. 107; 1 Sid. 152, 1 Keb. 557; proceeding on the alleged ground, that, if a parson were restrained from digging new mines in his glebe, no mines in any glebe could be opened; is unsustainable.

[1] See Marlborough *v.* St. John, 5 De G. & Sm. 178. See *ante*, p. 51.

[2] Holden *v.* Weekes, 1 J. & H. 283, 284, 285.

[3] *Ib.*, 284. See also the timber case of Marlborough *v.* St. John, *u. s.* 179.

[4] Doe *v.* Collinge, 7 C. B. 939.

[5] *Ante*, p. 78.

[6] See Holden *v.* Weekes, *u. s.*: see Mulliner, *v.* Mid. R. C., 11 Ch. D. 623.

[7] See Bartlett *v.* Phillips, 4 De G. & J. 414.

[8] The power to sanction the cutting of particular clumps of timber in a due course of management (Marlborough *v.* St. John, *u. s.* 179) does not, it is submitted, furnish any analogy upon this point. No doubt, in Holden *v.* Weekes (*u. s.* 284), V. C. Wood seems to have thought, that the principle applicable to timber might apply to mines: but he abstained from applying it, and directed an inquiry to ascertain what steps were necessary to obtain the proper sanction: see the decree, 287. See and consider *Re* Smith, 10 Ch. 85, *ante*, p. 43, n. [1], p. 44. Powers to sell and lease may be exercised under various statutory provisions: see *post*, Chap. VII., Part A., Sect. 7, *c.*; Chap. VIII., Sect. 5, *d.* (β).

[9] Trover formerly lay: see the timber case of Sowerby *v.* Fryer, 8 Eq. 423.

seems to be, that he may, if the severed chattels have been sold, have an action for an account,[1] or for damages. The minerals, if unsold, will be directed to be sold, and the proceeds invested for the benefit of the advowson.[2] And, assuming the correctness of the above opinion, if the minerals have been already sold, the amount, for which the wrongdoer is bound in respect of them to account,[3] will be similarly invested.[4] It is presumed, however, that the wrongdoer would not be allowed to receive the income.[5] An action for dilapidations will not lie against the estate of a parson or vicar at the suit of his successor, in respect of gravel dug, or minerals worked in the glebe.[6] For (1) the successor is not injured: as he could not have worked, even if the previous working had not taken place. And (2) an action for dilapidations lies not merely for voluntary but for permissive waste; and each incumbent is liable for the waste of his predecessor. If, therefore, such an action lay in respect of minerals, the estate of an incumbent would be liable, not merely in respect of minerals raised in his time, without his permission or knowledge, from mines extending, without his knowledge, under the glebe; but it would also be liable in respect of minerals so raised by any number of his predecessors. And in such an action the Statute of Limitations would afford imperfect protection; the waste being permissive and continuing.[7] If a parson or vicar improperly works, the patron may have an injunction or a prohibition to restrain the future working.[8] The patron is, in general, the only proper

Dilapidations.

Injunction or prohibition.

[1] Sowerby *v.* Fryer, 8 Eq. 423, *per* James, V. C. See also Bartlett *v.* Phillips, 4 De G. & J. 414. The law was laid down the other way by Lord Hardwicke in Knight *v.* Mosely, Amb. 176; and was acquiesced in by Wood, V. C. in Holden *v.* Weekes, 1 J. & H. 278, 286: but, as James, V. C. observed in Sowerby *v.* Fryer, *u. s.*, it is not easy to understand upon what grounds. Cf. Ross *v.* Adcock, L. R. 3 C. P. 665. For the form of the account which will be directed, see Holden *v.* Weekes, *u. s.* 287.

[2] See Sowerby *v.* Fryer, *u. s.*

[3] See *post*, Chap. XXII., Sect. 2, *c.*

[4] See Bartlett *v.* Phillips, *u. s.*; Holden *v.* Weekes, *u. s.*, 286, 287. See however, Ross *v.* Adcock, *u. s.*

[5] For the form of the declaration which in such a case will be made, see Holden *v.* Weekes, *u. s.*, 287.

[6] Ross *v.* Adcock, *u. s.*, 655, 669 *et seq.*; overruling the law supposed to have been laid down in Huntley *v.* Russell, 13 Q. B. 572.

[7] Ross *v.* Adcock, *u. s.*, 664, 665, 670.

[8] Knight *v.* Mosely, Amb. 176; Bradley *v.* Stratchy, Barn. 399; nom. Strachy *v.* Francis, 2 Atk. 217; Hoskins *v.* Featherston, 2 B. C. C. 552; Holden *v.* Weekes, 1 J. & H. 278, 285; Ross *v.* Adcock, L. R. 3 C. P. 664: see also

person to take proceedings against a parson or vicar.[1] If, however, the patron colludes with the parson or vicar in committing waste, the ordinary may have an injunction.[2] Indeed it has been said, that not only the patron or ordinary but the Metropolitan or even the Crown may, in case of need, interfere to prevent waste by a parson.[3] And an injunction may be had at the suit of the patron against the widow of a parson during a vacancy.[4] A parson or vicar who improperly works may also be punished in the Ecclesiastical Court by deprivation.[5]

Deprivation.

Sect. 4.—Workings—Lands subject to Mortgage.

a. Mortgagor.

Mortgagor may work unless security prejudiced.

Where mines or quarries are the subject of a mortgage, the mortgagor, if in possession, may work them; unless the security would be thereby made insufficient or scanty;[6] in which event, the mortgagee may have an injunction to restrain him.[7]

b. Mortgagee—Open Mines or Quarries.[8]

Mortgagee may work open mines or quarries.

The mortgagee in possession of mines or quarries open at the time he entered may, if he pleases, continue the working of them.[9] And if they are open when he entered, it is immaterial whether the opening took place before or after the date of his mortgage. An opening of a mine or quarry by a person who is still in actual possession, although after he has executed a mortgage, will enure for the benefit of the mortgagee.[10] And, of course, a working under a lease granted by

Salisbury's Case, Godb. 259; Marlborough *v.* St. John, 5 De G. & Sm. 174; Sowerby *v.* Fryer, 8 Eq. 417, 423.

[1] Holden *v.* Weekes, 1 J. & H. 278, 285: see also Wither *v.* Winchester, 3 Mer. 427.

[2] Holden *v.* Weekes, *u. s.*

[3] Ross *v.* Adcock, L. R. 3 C. P. 669.

[4] Hoskins *v.* Featherston, 2 B. C. C. 552.

[5] Ross *v.* Adcock, *u. s.*, 664: see also Salisbury's Case, Godb. 259.

[6] See the timber cases of Usborne *v.* Usborne, 1 Dick. 75; Farrant *v.* Lovel, 3 Atk. 723: Humphreys *v.* Harrison, 1 J. & W. 581; Hippesley *v.* Spencer, 5 Madd. 422: King *v.* Smith, 2 Ha. 239; Simmins *v.* Shirley, 6 Ch. D. 175.

[7] *Ib.* For the form of an interim order, which in such case will be made, see Lloyd *v.* Lloyd Co., Set. 189.

[8] As to open mines or quarries, see *ante*, pp. 22 *et seq.*

[9] See Elias *v.* Snowdon, &c., Co., 4 App. Cas. 454, 460.

[10] *Ib.*

the mortgagor will, for this purpose, be the same as a working by the mortgagor himself.[1] Indeed, a mortgagee in possession of mines or quarries open at the time he entered must, in ordinary cases, in order to prevent loss to the property, continue the working of them.[2]

In general must do so.

A mortgagee in possession of open mines or quarries cannot, however, be compelled by his mortgagor to advance more money in working them than a prudent owner would do; no matter how probable it may be, that they would be improved by a large expenditure.[3] For he is not, *primâ facie*, in the same position as an absolute owner. If he were an absolute owner, he might speculate as much as he pleased. He would, no doubt, have to bear the loss, if he were unfortunate; but he would, on the other hand, reap all the advantages, if he were successful. But if a mortgagee of a mine or quarry makes a profit by working it, that profit must, *primâ facie*, go towards discharging his mortgage debt; whereas, if he incurs a loss, he must, *primâ facie*, bear that loss himself.[4] Of course, however, the *primâ facie* position of a mortgagee may be controlled by express agreement. Thus, where a mortgage deed gave the mortgagees power, in case of default in payment, to enter into possession and work; and provided, that the mortgagors should repay to them all costs and expenses, and all further advances, and interest at £5 per cent.; and the mortgagees entered into possession, worked the mines, and expended £60,000 on the works; it was, on a bill for redemption by the mortgagors, held that the mortgagees were entitled to be allowed the £60,000, and also interest thereon at £5 per cent.[5]

But he may not, *primâ facie*, speculate.

A mortgagor of mines or quarries may sometimes, having regard to the fact that the mortgagee in possession is their legal owner, obtain an order for a receiver and manager against him. The Court will not, however, appoint a receiver against a mortgagee in possession, who alleges that he is still unpaid, unless some particular and specified kind of mismanagement is

Receiver and manager.

[1] *Ib.*

[2] See Rowe *v.* Wood, 2 J. & W. 555, 556.

[3] *Ib.*

[4] See *ib.*

[5] Norton *v.* Cooper, 25 L. J. Ch. 121: s. c. 5 De G. M. & G. 728.

proved against him.[1] And the mere fact of a mortgagee in possession not making a large expenditure upon the works will not be considered an act of mismanagement on his part; no matter how probable it may be that the works may be benefited by a large expenditure.[2] In taking the accounts under a decree in a redemption action against a mortgagee in possession of mines or quarries, the mortgagee is, under the head of "just allowances," entitled to be recouped all moneys which he has expended upon necessary repairs. But to entitle him in respect of permanent improvements, or substantial repairs, he must make out a case for them at the trial.[3]

Just allowances.

c. *Mortgagee—New Mines or Quarries.*[4]

Mortgagee not bound to work new mines or quarries.

Nor entitled to do so unless security insufficient.

A mortgagee, who is in possession of land containing unopened mines or quarries, is not bound to open and work them. He is not bound to engage in speculations for the benefit of the mortgagor.[5] On the other hand, a mortgagee, who is in possession of land containing unopened mines or quarries, and whose security is not insufficient, is not entitled, *primâ facie*, to open and work them.[6] The reason is that a mortgagee, who opens and works new mines or quarries, destroys a part of the inheritance, which the mortgagor, when he comes to redeem, should be entitled to get back.[7] And a mortgagee, whose security is not insufficient, and who authorizes strangers to work, is, although not in possession himself, responsible for their acts.[8] If such a mortgagee does open and work new mines or quarries, the mortgagor may, of course, charge him with his receipts.[9] And he will be disallowed the costs both of working and winning, and of bringing to bank;[10]

Remedies for wrongful workings.

[1] Rowe *v.* Wood, 2 J. & W. 555, 556, 557, 558.

[2] *Ib.* 555, 556: see *ante*, p. 83.

[3] Tipton Green Colliery Co. *v.* Tipton Moat Colliery Co., 7 Ch. D. 192.

[4] As to new mines or quarries, see *ante*, pp. 22 *et seq.*

[5] See Hughes *v.* Williams, 12 Ves. 493, 496, *per* Lord Erskine.

[6] Thorneycroft *v.* Crockett, 16 Sim. 445; Hood *v.* Easton, 2 Giff. 692; 2 Jur. N. S. 917; Millett *v.* Davey, 31 Beav. 470, 475.

[7] See Thorneycroft *v.* Crockett, *u. s.*; Hood *v.* Easton, 2 Giff. 697; Millett *v.* Davey, *u. s.*, 475, 476.

[8] Hood *v.* Easton, 2 Giff. 692.

[9] Hughes *v.* Williams, *u. s.*; Thorneycroft *v.* Crockett, *u. s.*; Hood *v.* Easton, *u. s.*; Millett *v.* Davey, *u. s.*, 470, 475: see also Farrant *v.* Lovel, 3 Atk. 723.

[10] Hughes *v.* Williams, *u. s.*; Thorneycroft *v.* Crockett, *u. s.*; Hood *v.* Easton, *u. s.*; Millett *v.* Davey, *u. s.*, 476. For the form of the account, see Hood *v.* Easton,

his speculations being at his own hazard.[1] And the Statute of Limitations will not avail him as a defence; the workings being in the nature of a breach of trust.[2] And the mortgagor may sometimes also charge him with an occupation rent.[3] And he may also in general have an injunction.[4]

Entitled to do so if security insufficient.

If, however, a mortgagee in possession can show that his security is insufficient, he will, acting *bonâ fide*, be allowed to open and work new mines or quarries; accounting, of course, to the mortgagor for the profits which he receives.[5] And his liability to account will usually be confined to such profits. He will not be liable to account either for the value of the ore raised, or for the damage to the soil: at all events where the mortgagor has known of the working, and, without remonstrance or complaint, has allowed it to proceed for several years.[6] The onus, however, lies on the mortgagee to show, that the security is insufficient.[7] But the fact, that his interest was in arrear when he commenced to work, will usually go far to discharge that onus.[8] And in such a case it will usually be vain for the mortgagor to say, that the property, including the mines or quarries, might have been sold and a surplus obtained; especially if the workings have not in fact been profitable.[9] As in the case of a mortgagee who continues the working of open mines or quarries,[10] a mortgagee, who opens and works new mines or quarries, cannot, even if his security be insufficient, charge his mortgagor with any losses incurred in the workings. "He does it at his own risk and peril; so that if he incurs a great loss in working the mine, he cannot charge a penny of that loss against the mortgagor, and if he obtains a great profit, the whole of that profit must go in discharge of his mortgage debt. That is the condition on which he speculates; but, subject to that condition

But may not speculate.

2 Giff. 701. Cf., *post*, Chap. XXII., Sect. 2, *c*.

[1] Hughes *v.* Williams, 12 Ves. 493, 496.

[2] See Hood *v.* Easton, 2 Giff. 692; 2 Jur. N. S. 917.

[3] For the form of an inquiry and direction, which will in such a case be made, see Jeanes *v.* Hutchins, Set. 1069; Thorneycroft *v.* Crockett, 16 Sim. 445.

[4] See the timber case of Farrant *v.* Lovel, 3 Atk. 723.

[5] Millett *v.* Davey, 31 Beav. 470, 476, 477.

[6] *Ib.* 477. In that case the mortgagor had stood by for four years.

[7] Millett *v.* Davey, *u. s.*, 473, 474, 475.

[8] *Ib.*

[9] *Ib.* 474.

[10] See *ante*, p. 83.

and speculation, he is entitled to make the most of the property for the purpose of discharging what is due to him."[1]

Wanton or destructive waste.

Whether the security of a mortgagee in possession is, or is not, insufficient, he will be restrained from working mines or quarries, so as to commit wanton or destructive waste.[2]

SECT. 5.—WORKINGS—LANDS SUBJECT TO CONTRACT.

Workings by vendor.

A purchaser is entitled, *primâ facie*, to the subject matter of the contract as from the date of the contract. If, therefore, subsequently to the contract, the vendor works and removes minerals out of the land in question, he will be liable in respect of the proceeds.[3]

Workings by purchaser.

On the other hand, where the purchaser of a mine or quarry is, before conveyance, allowed into possession, and commences to work, he may be ordered, on motion, to pay his purchase money into Court.[4] Indeed, the vendor being entitled to the usual vendor's lien, the purchaser occupies the same position as a mortgagor in possession; and, if his working is shown to be lessening the security, it may be restrained.[5]

SECT. 6.—WORKINGS—LANDS OF RAILWAY OR HARBOUR COMPANIES.

General disability to work.

Although it is lawful for a railway or a harbour company to acquire mines,[6] it is, *primâ facie, ultra vires* of such a company to work them as a part of their regular operations.[7] But where

[1] Millett *v.* Davey, 31 Beav. 476, *per* Lord Romilly.

[2] Millett *v.* Davey, *u. s.* As to rent-charges, see 44 & 45 Vict. c. 41, s. 44. For the position of the mortgagee of a partner, see *post*, Chap. VI., Sect. 3, *a*, *b*.

[3] Nelson *v.* Bridges, 2 Beav. 243; Brown *v.* Dibbs, 25 W. R. 776. As to the measure of damages, see *post*, Chap. XXII., Sect. 2, *c*.

[4] Buck *v.* Lodge, 18 Ves. 450: see also the timber cases of Dixon *v.* Astley, 1 Mer. 133; Cutler *v.* Simons, 2 *ib.* 106.

[5] See Crockford *v.* Alexander, 15 Ves. 138. See, as to a mortgagor in possession, *ante*, p. 82.

[6] See *post*, Chap. VII., Part A., Sect. 6.

[7] Eccl. Commrs. *v.* N. E. R. C., 4 Ch. D. 845, 855, 856; Dixon *v.* Caledonian, &c. Comp., 5 App. Cas. 833: cf. Mulliner *v.* Mid. R. C., 11 Ch. D. 622, 623. As to interference at the instance of the Att.-Gen., see A.-G. *v.* G. E. R. C., 11 Ch. D. 449; 5 App. Cas. 473.

a railway company keep lands under the belief, whether rightly or wrongly, that they will use them at a future time, they may in the meantime utilise them by working the minerals thereunder.[1]

SECT. 7.—USER—COPYHOLDS.

Lord may not, *primâ facie*, use surface.

It has been already seen, that upon a grant of copyholds the right of possession both of the surface and of the subsoil generally, with all the mines or quarries therein contained, becomes vested in the copyholder; and that the same principle applies to the chamber which contains those mines or quarries, and to the space or vacuum created by their partial or total working.[2] It follows, that the lord of a manor is not entitled, *primâ facie*, to dig pits upon the surface of the copyholds for the purpose of working the mines;[3] or to deposit earth or rubbish upon such surface;[4] or to use any part of such surface or of the subsoil as a tramway or railway for the carriage of minerals.[5]

Or sub-soil—transport, ventilation and drainage.

For similar reasons, although the lord of a manor may have a right, founded on grant or custom,[6] to use a portion of the subsoil for the carriage of minerals gotten from the manorial mines, he has not, *primâ facie*, any right to use that portion for the carriage of minerals gotten in an adjoining mine. And if the lord, in exercise of a customary right to work the manorial mines and carry away the minerals, creates a space by his workings, he is not entitled, *primâ facie*, to carry along such space minerals gotten in an adjoining mine.[7] The right of user of such space belongs to the copyholder. "He is entitled to use it at his will and pleasure. If you have a shaft made for working the mines, the

[1] See and consider Hooper *v.* Bourne, 5 App. Cas. 22, *per* Lord Blackburn.

[2] *Ante*, pp. 34, 35.

[3] See Player *v.* Roberts, Sir W. Jones, 243; Townley *v.* Gibson, 2 T. R. 707; Grey *v.* Northumberland, 13 Ves. 236; 17 *ib.* 282; Bourne *v.* Taylor, 10 East, 189; Ballacorkish, &c., Co. *v.* Harrison, L. R. 5 P. C. 59.

[4] See Ballacorkish, &c., Co. *v.* Harrison, *u. s.*, 59, 60.

[5] See Holden *v.* Hargreaves, Sct. 204, 205, where the form is given of an interlocutory injunction restraining his lessees.

[6] See *post*, Chap. V., Sect. 4.

[7] See Bowser *v.* Maclean, 2 De G. F. & J. 415; Proud *v.* Bates, 34 L. J. Ch. 411; Eardley *v.* Granville, 3 Ch. D. 826, 833.

copyholder may descend in the shaft, and either walk about in the space below, or use it for any other rational purpose."[1] And, of course, the same principles, which apply to transport, apply to ventilation and drainage.

Bowser v. Maclean.

Bowser v. *Maclean*[2] was decided in accordance with these principles. There the lord of a manor was entitled, according to the custom of the manor, to work the minerals under a copyhold tenement belonging to the plaintiffs, and to carry them away; and for these purposes to make a tramway through the subsoil of the copyhold. The defendant was the lessee under the lord of the manorial mines. The defendant carried along the tramway coals dug beyond the limits of the manor, in order to bring them to the surface by a pit within the manor. It was held, that this was an unlawful user of the tramway.

Eardley v. Granville.

So in *Eardley* v. *Granville*.[3] There Earl Granville was the lessee of certain manorial mines, with a right to work them, and, for that purpose, to enter on the surface of the copyholds; and he worked these mines by means of a pit sunk beneath a copyhold tenement of the manor. Between such pit and a station of the North Staffordshire Railway Co. lay, in consecutive order: (1) another copyhold tenement of the manor, in the possession of the plaintiffs; (2) a freehold of Ralph Sneyd; and (3) a freehold of the plaintiffs. The Earl subsequently became the lessee of the mines under the Sneyd freehold. He finally took a lease of part of the plaintiffs' freehold, for the purpose of completing a railway then in course of construction over the plaintiffs' copyhold and the Sneyd freehold, from the mouth of the pit to the North Staffordshire Railway Station. The last-mentioned lease provided for the carriage over the plaintiffs' freehold by the Earl of the produce of the mines belonging to or occupied by the Earl or belonging to Sneyd: but it did not provide for such carriage over the plaintiffs' copyhold. Shortly afterwards the Earl drove a crut from the Sneyd mines under the plaintiffs' copyhold to the pit, and proceeded to carry the minerals from the Sneyd mines along such crut through the pit to the surface, and thence, by the railway,

[1] Eardley *v.* Granville, 3 Ch. D. 833, *per* Jessel, M. R.

[2] 2 De G. F. & J. 415.

[3] 3 Ch. D. 826.

over the copyhold of the plaintiffs, the freehold of Sneyd, and the freehold of the plaintiffs, to the railway station. He was held not entitled to carry the Sneyd minerals either under or over the plaintiffs' copyhold.[1]

[1] An injunction to restrain him, and to compel the restoration of the condition of the subsoil, was accordingly granted. For the form, see Set. 204.

CHAPTER V.

WORKINGS AND USER, FOUNDED ON CUSTOM, PRESCRIPTION, AND STATUTE.[1]

SECT. 1.—WORKINGS—PROFITS *À PRENDRE.*

a. Custom.[2]

(*a*) *Generally.*

Right of profit *à prendre* not in general claimable by custom.

No right of profit *à prendre in alieno solo* can (except in the special instances which will be presently adverted to[3]) be claimed by custom.[4] Accordingly, an alleged right in all the inhabitants for the time being of a particular parish occupying messuages and lands within the parish to take sand, which had been drifted upon a particular close from the sea-shore ;[5]

[1] The general law only is here stated. With respect to workings and user under local customs and statutes, see *post*, Chapters XVIII., XX., and XXI.

[2] The difference between custom and prescription is this :—Custom is a local usage, annexed to a particular place : prescription is a personal privilege, annexed to a particular person (Shelf. Real Prop. Stat. 29, 30). Prescription is of two kinds :—either a right, which has been exercised by a particular man and his ancestors ; or a right annexed to the ownership of a particular estate, and only exerciseable by those who are seised of that estate (*ib.* 30 ; Austin *v.* Amhurst, 7 Ch. D. 692) : the latter kind of prescription is called a prescription in a que estate (*ib.* ; Constable *v.* Nicholson, 14 C. B. N. S. 230, 240, 241). See Hanmer *v.* Chance, 4 De G. J. & S. 626, 631. It is not every kind of custom, which is valid. In order to give validity to a custom, it must be certain, or capable of being reduced to a certainty : it must be reasonable : it must commence from time immemorial ; and it must be continued without interruption (Tanistry Case, Davys' Rep. 28 ; Tyson *v.* Smith, 9 A. & E. 421). However, when it is said that a custom is void because it is unreasonable, nothing more is meant than that the unreasonable character of the alleged custom proves that the usage, even though it may have existed immemorially, must have resulted from accident or indulgence, and not from any right conferred in ancient times on the party setting up the custom (Salisbury *v.* Gladstone, 9 H. L. C. 701, 702, *per* Lord Cranworth ; Warrick *v.* Queen's Coll. Oxford, 6 Ch. 722).

[3] *infra*, (β), (δ).

[4] Gateward's Case, 6 Rep. 59 b : nom. Smith *v.* Gatewood, Cro. Jac. 152.

[5] Blewett *v.* Tregonning, 3 A. & E. 554 ; A.-G. *v.* Mathias, 4 K. & J. 591.

or in the inhabitants of a township to take stones from the land of another person for the purpose of cultivating and improving their land, or for the purpose of repairing highways;[1] or in a surveyor[2] or overseer[3] of highways to take stones from the land of another for the purpose of repairing highways;[4] or in the Forester of the Crown in a particular place within the Forest of Dean to grant gales of the Crown quarries therein, without accounting to the Crown for the proceeds;[5] cannot have any legal foundation in custom.[6] And it is immaterial, however ancient, uniform, and clear the exercise of the custom may be.[7]

(β) *Copyholders and Wastes—generally.*[8]

Exception in case of copyholder and waste.

An exception to the rule has, however, been admitted in the case of copyholds. A copyholder for life or inheritance may claim by custom a right of profit *à prendre* in the demesne or waste lands of the manor.[9] A "flux body," such as copyholders, "which has no entirety or permanence," cannot prescribe in its own name and right for a right of profit *à prendre in alieno*

[1] Constable *v.* Nicholson, 14 C. B. N. S. 230.

[2] Padwick *v.* Knight, 7 Exch. 854.

[3] Constable *v.* Nicholson, *u. s.*

[4] This may usually be done under statutory powers: see *infra*, Sect. 3.

[5] A.-G. *v.* Mathias, 4. K. & J. 579. See, as to the Forest of Dean, *post*, Chap. XX. The claim in question in A.-G. *v.* Mathias was saved by the Act 1 & 2 Vict. c. 43: see s. 85. See *post*, Chap. XX., *a*.

[6] See also Grimstead *v.* Marlow, 4 T. R. 717; Mellor *v.* Spateman, 1 Wm. Saund. 620; Austin *v.* Amhurst, 7 Ch. D. 691, 692; Chilton *v.* London, *ib.* 740; Rivers *v.* Adams, 3 Exch. D. 364; Saltash *v.* Goodman, 5 C. P. D. 431, 446, 454; Goodman *v.* Saltash, 7 App. Cas. 641, 648, 654 to 662, 669. These cases, and the cases referred to in the preceding notes, decide what was left undecided in Johnson *v.* Wyard, 2 Lutw. 1344; Clowes *v.* Beck, 13 Beav. 347; Padwick *v.* Knight. 7 Exch. 861. The dictum to the opposite effect in Bond's Case, March 16, is not law; and, in so far as Stile *v.* Butts, Cro. Eliz. 434, and Oxenden *v.* Palmer, 2 B. & Ad. 236, are inconsistent with the propositions in the text, they cannot be supported: see Constable *v.* Nicholson, 14 C. B. N. S. 239, 240, 241. Cf. Abbot *v.* Weekly, 1 Lev. 176; Fitch *v.* Rawling, 2 H. Bl. 393; Tyson *v.* Smith, 6 A. & E. 745; 9 *ib.* 406; Elwood *v.* Bullock, 6 Q. B. 383. The customs there held valid were not rights of profit *à prendre*.

[7] See A.-G. *v.* Mathias, *u. s.*, 590; Saltash *v.* Goodman, 5 C. P. D. 450, 451.

[8] For the right of inclosing commons see *post*, Chap. VII., Part B., Sect. 2.

[9] See Gateward's Case, 6 Rep. 60, b; nom. Smith *v.* Gatewood, Cro. Jac. 152; Duberley *v.* Page, 2. T. R. 391; Shakespear *v.* Peppin, 6 *ib.* 741; R. *v.* Churchhill, 4 B. & C. 755; Rogers *v.* Brenton, 10 Q. B. 60; A.-G. *v.* Hanmer, 27 L. J. Ch. 841; Portland *v.* Hill, 2 Eq. 765, 780; Warrick *v.* Queen's Coll. Oxford. 6 Ch. 724: see also Mellor *v.* Spateman, 1 Wm. Saund. 620.

solo: nor can it in the lord's name; for he cannot claim common in his own land. As, therefore, it is impossible that it can claim by prescription, it is allowed to do so by custom.[1]

But right subject to restriction.

However, an ancient common of turbary, or the right of taking peat or turf from the waste land of another for fuel in the commoner's house,[2] can only, where claimed by custom, be claimed in respect of an ancient house or building, or a house standing in place of it;[3] and for the purpose of being spent or consumed thereon.[4] And so, in other cases of rights of profit *à prendre*, the right cannot be claimed without restriction or limitation. Thus, alleged rights by custom in the copyholders of a manor having gardens parcels of their customary tenements to take turf from the common of the manor, at all times of the year, as often and in such quantity as occasion required, for the purpose of making and repairing grass plots in such gardens for the improvement thereof, and for the purpose of making and repairing the banks and mounds in, of, and for the hedges and fences of such customary tenements, have been held bad; as too uncertain and indefinite.[5] And, independently of ancient common of turbary, an alleged right by custom in the copyholders of a manor must apparently, to be valid, be confined to necessary consumption and repairs upon the ancient copyholds.[6] One, who improperly exercises a right of profit *à prendre*, commits waste, and may be restrained by injunction.[7]

Occupant.

Whether or not it be possible, not only for a copyhold tenant, but for the mere occupant of a copyhold tenement, to claim by custom a right of profit *à prendre* in the waste of the manor,[8] it is at all events certain that an ancient common of turbary cannot be claimed by a mere occupant.[9] Where the tenant of an Irish holding exercises as such a right of cutting and taking turf over uninclosed land in common with other commoners, if the holding

Irish tenant.

[1] See Rogers *v.* Brenton, 10 Q. B. 61, 62, *per* Lord Denman.

[2] See Elton on Commons, 95.

[3] See Clarkson *v.* Woodhouse, 5 T. R. 414 n., 415 n.; Warrick *v.* Queen's Coll. Oxford, 6 Ch. 730.

[4] Ely *v.* Warren, 2 Atk. 190.

[5] See Wilson *v.* Willes, 7 East, 121; see also Rogers *v.* Brenton, 10 Q. B. 26, 57, 60; and cf. Clayton *v.* Corby, 5 *ib.* 415.

[6] See Scriv. on Cop. 316: see also Peppin *v.* Shakespear, 6 T. R. 748; A.-G. *v.* Hanmer, 27 L. J. Ch. 841.

[7] See Ely *v.* Warren, *u. s.*

[8] See *ib.*, 189, 190.

[9] *Ib.*, 190.

becomes subject to a statutory term under the Irish Act, 44 & 45 Vict. c. 49, the landlord or any commoner may obtain from the Civil Bill Court of the County an injunction to restrain the tenant from exercising his right otherwise than according to the ordinary usage which has prevailed amongst the commoners.[1]

(γ) *Copyholders and Wastes—Evidence of Custom.*

Evidence of custom.

Evidence as to neighbouring manors is not in general admissible to show the custom in the particular manor in question; every manor being governed by its own customs.[2] But in the case of manors having a great physical similitude, such as those in the fen districts, a copyholder of the manor in question, claiming the right to dig the soil of the common for turf, may adduce evidence as to the existence of a similar right in the neighbouring manors.[3] So in the mining districts of Cornwall and Derbyshire, where the local customs prevail, evidence of what has taken place in one manor may, it seems, be admitted for the purpose of explaining or showing the custom in another.[4] General evidence of reputation is probably admissible in support of a customary right of digging stones on the lord's waste.[5] A custom pleaded for the tenant of a particular tenement was not allowed to be proved by evidence of a general custom for all the copyholders to the same effect.[6]

(δ) *Public Good.*

Public good.

A custom for freemen and proprietors of ships within a borough to dig gravel on the shore for ballast has also been held to be good; as being for the maintenance of navigation.[7]

[1] Ss. 17, 37.

[2] Ely *v.* Warren, 2 Atk. 189.

[3] *Ib.*

[4] *Ib.* As to these local customs, see *post*, Chapters XVIII., XXI.

[5] See Morewood *v.* Wood, 14 East, 326 n.

[6] Wilson *v.* Page, 4 Esp. 71.

[7] See Lynn Regis *v.* Taylor, 3 Lev. 160: see however, Padwick *v.* Knight; and Constable *v.* Nicholson, *ante*, p. 91; where the custom set up might equally well have been considered a custom *pro bono publico*, and was nevertheless held bad.

b. Prescription.

(*a*) *Generally—Freeholders and Wastes*[1]*—Evidence.*

Right of profit *à prendre* in general claimable by prescription.

A right of profit *à prendre in alieno solo* may, generally,[2] be claimed by prescription.[3] It has, accordingly, been considered that a right to take turf and stones,[4] or coal,[5] in the land of another may be properly claimed by prescription. And the freeholders of a manor may properly claim by prescription a right to cut turf or dig gravel out of the lord's waste.[6] And where the freeholders have, in fact, exercised such a right for many years, the Court will try to find a legal origin therefor.[7] And where such a right has for many years been exercised by the freeholders and also by the inhabitants, the Court will presume, that the inhabitants claimed through the freeholders.[8] It is said, that the reason why the right in question may in general be claimed by prescription, but not by custom, is that a prescriptive right, which is personal, may be released; but that a custom, which is local, cannot be released.[9] In the case of the freeholders of a manor, it seems, that building on the freehold would be deemed an abandonment of the right.[10] The infringement of the right may be restrained by injunction.[11] And, if the right belongs to the freeholders of a manor, one may sue on

[1] For the right of inclosing commons, see *post*, Chap. VII., Part B., Sect. 2.

[2] For the exception, see *infra* (*β*).

[3] See Gateward's Case, 6 Rep. 60 b, nom. Smith *v.* Gatewood, Cro. Jac. 152; Hayward *v.* Cunnington, 1 Lev. 231; Mellor *v.* Spateman, 1 Wm. Saund. 620; Grimstead *v.* Marlow, 4 T. R. 717; Blewett *v.* Tregonning, 3 A. & E. 554; Clayton *v.* Corby, 5 Q. B. 415; A.-G. *v.* Mathias, 4 K. & J. 579; Constable *v.* Nicholson, 14 C. B. N. S. 230; De la Warr *v.* Miles, 17 Ch. D. 535.

[4] See Incledon *v.* Burges, Carth. 65.

[5] See Wilkinson *v.* Proud, 11 M. & W. 33. See also A.-G. *v.* Hanmer, 27 L. J. Ch. 841, where it was said that freeholders might acquire by prescription a right to get stones and sand from the foreshore to repair their buildings and walls.

[6] See Warrick *v.* Queen's Coll. Oxford, 6 Ch. 724; Betts *v.* Thompson, *ib.* 739.

[7] Warrick *v.* Queen's Coll. Oxford, 10 Eq. 105; 6 Ch. 716. 722; Betts *v.* Thompson, *u. s.*, 736.

[8] *Ib.* Cf. Saltash *v.* Goodman, 5 C. P. D. 431.

[9] See Mellor *v.* Spateman, 1 Wm. Saund. 620; Grimstead *v.* Marlow, 4 T. R. 719; A.-G. *v.* Mathias, 4 K. & J. 591; Goodman *v.* Saltash, 7 App. Cas. 658. As to custom, see *ante*, p. 90.

[10] Warrick *v.* Queen's Coll. Oxford, 6 Ch. 730.

[11] For the form of the injunction, see Warrick *v.* Queen's Coll., Oxford, Set. 218; Betts *v.* Thompson, Set. 217, 218.

behalf of himself and all the others.[1] The County Court has jurisdiction to grant an injunction, subject to an appeal by any person aggrieved to the High Court.[2]

But right subject to restriction.

However, an ancient common of turbary, where claimed by prescription, as where claimed by custom,[3] must be claimed in respect of an ancient dwelling-house, or a house standing in place of it;[4] and for the purpose of being spent or consumed thereon.[5] And so, in other cases of rights of profits *à prendre*, where claimed by prescription, the claim must not be without limitation or restriction. Where, accordingly, the defendant, in an action of trespass, pleaded, that he was the owner of a brick kiln; and that he and all the occupiers thereof had for 30 years enjoyed as of right and without interruption a right to dig and take away from the plaintiff's close so much clay as was at any time required for making bricks at the brick kiln in any year and at all times of the year; it was held, that the right claimed amounted to an indefinite claim to take all the clay out of the close, and was, therefore, bad.[6] And, where the Forester of the Crown in a particular place in the Forest of Dean claimed a right by prescription to grant gales of the Crown quarries therein without accounting to the Crown for the proceeds, it was held, that the claim, being in effect a claim to carry away the soil of another without stint or limit, could not be sustained.[7] And it is immaterial, however strong the evidence of the user may be.[8] The right must also in every case be claimed either as being annexed to land; or as being enjoyed in gross by a body capable of continuing, such as a corporation; or as being so enjoyed by a person claiming by descent.[9] It has,

[1] Warrick *v.* Queen's Coll. Oxford, 10 Eq. 105; 6 Ch. 716; Betts *v.* Thompson, 6 Ch. 732.

[2] 39 & 40 Vict. c. 56, s. 30. A claim to a part of the soil of another cannot be sustained by prescription: see Wilkinson *v.* Proud, 11 M. & W. 33.

[3] *Ante*, p. 92.

[4] Warrick *v.* Queen's Coll. Oxford, 6 Ch. 730.

[5] Valentine *v.* Penny, Noy, 145; Hayward *v.* Cunnington, 2 Keble, 290, 311; Williams on Commons, 192.

[6] Clayton *v.* Corby, 5 Q. B. 415: cf. Goodman *v.* Saltash, 7 App. Cas. 646.

[7] A.-G. *v.* Mathias, 4 K. & J. 579. A claim by custom also failed: see *ante*, p. 91. See also A.-G. *v.* Gauntlett, 3 Y. & J. 93; Bailey *v.* Stevens, 12 C. B. N. S. 91; Saltash *v.* Goodman, 5 C. P. D. 431, 448, 449.

[8] A.-G. *v.* Mathias, *u. s.*; Johnson *v.* Barnes, L. R. 7 C. P. 604; Saltash *v.* Goodman, *u. s.*, 451.

[9] See A.-G. *v.* Gauntlett, 3 Y. & J.

for instance, been held, that a right for the inhabitants of a township, as such, to take stones from the land of another person for the purpose of repairing the highway, cannot be claimed by prescription ; inhabitants, as such, not being a body capable of taking a grant.[1] And a charter from the Crown,[2] or an Act of Parliament,[3] incorporating the inhabitants, will not easily be presumed.[4] And occupiers cannot claim in respect of the estate of another against that other.[5] It is, however, possible to show by prescription a valid right of cutting turf more extensive than common of turbary; as, for instance, a right of cutting turf in respect of new or additional buildings.[6]

Evidence of right.

An original grant of the right to dig stones out of a common does not necessarily extend to the whole of the common. It may have been either a general grant to dig out of the whole of the common, or a grant to dig except as to the particular part in question. An assertion, therefore, of a prescriptive right to dig stones out of a particular part of a common must be supported by evidence as to user in respect of that part.[7] General evidence of reputation is probably not admissible in support of a prescriptive right of digging stones on the lord's waste.[8]

Commoner only entitled to what he digs.

A commoner entitled to dig and take clay has no right to take that which another has dug, although he be no commoner: for a commoner is only entitled to what he himself digs.[9]

93 ; Bailey *v.* Stevens, 12 C. B. N. S. 91 ; Constable *v.* Nicholson, 14 *ib.*, 230, 231 ; Austin *v.* Amhurst, 7 Ch. D. 692 ; Goodman *v.* Saltash, 7 App. Cas. 641, 664.

[1] Constable *v.* Nicholson, *u. s.*, 230, 234 : overruling the suggestion to the contrary in Padwick *v.* Knight, 7 Exch. 861. See also Smith *v.* Gatewood, Cro. Jac. 152 ; Lockwood *v.* Wood, 6 Q. B. 64 ; Warrick *v.* Queen's Coll. Oxford, 6 Ch. 724 ; Chilton *v.* London, 7 Ch. D. 728, 740 ; Rivers *v.* Adams, 3 Exch. D. 363, 364 ; Saltash *v.* Goodman, 5 C. P. D. 431.

[2] Chilton *v.* London, *u. s.*, 740 *et seq.* ; Rivers *v.* Adams, *u. s.*, 365 *et seq.* ; Saltash *v.* Goodman, 5 C. P. D. 445 *et seq.* ; Goodman *v.* Saltash, *u. s.*, 637, 648.

[3] Chilton *v.* London, *u. s.*

[4] Cf. Warrick *v.* Queen's Coll. Oxford, *u. s.*, 716, 722 ; *ante*, p. 94.

[5] Austin *v.* Amhurst, *u. s.* ; Goodman *v.* Saltash, *u. s.*, 641, 642.

[6] Warrick *v.* Queen's Coll. Oxford, *u. s.*, 721, 730, 731.

[7] Maxwell *v.* Martin, 6 Bing. 522.

[8] Morewood *v.* Wood, 14 East, 328 n.

[9] Stile *v.* Butts. Cro. Eliz. 434.

(β) *Copyholders and Wastes.*

Exception in case of copyholder and waste.

To the rule, that a right of profit *à prendre* may be claimed by prescription, an exception exists in the case of a copyholder. Such a person cannot claim by prescription a right of profit *à prendre* in the waste land of a manor.[1] The exception is, however, confined to the waste land of the particular manor of which the copyholder holds. The copyholders of one manor may claim a right of profit *à prendre* in the wastes of another manor by prescribing in the name of their lord.[2]

c. *Lost Grant—Prescription Act.*

Lost grant.

If a right of profit *à prendre in alieno solo* cannot be sustained on the ground either of custom or of prescription, it cannot be sustained on the ground of a lost grant. For, if a grant of an unreasonable claim before the time of legal memory cannot be presumed, *à fortiori* such a grant cannot be presumed since.[3]

Prescription Act.

And if a right of profit *à prendre in alieno solo* cannot be sustained on the ground of custom or prescription, it cannot be sustained under the Prescription Act by an user, however long;[4] that Act merely giving validity to claims, "which may be lawfully made at the common law by custom, prescription, or grant."[5]

[1] See Gateward's Case, 6 Rep. 60 b.; nom. Smith *v.* Gatewood, Cro. Jac. 152; Mellor *v.* Spateman, 1 Wms. Saund. 620; R. *v.* Churchhill, 4 B. & C. 755; Rogers *v.* Brenton, 10 Q. B. 60; Portland *v.* Hill, 2 Eq. 765.

[2] See Rogers *v.* Brenton, 10 Q. B. 61.

[3] See A.-G. *v.* Mathias, 4 K. & J. 579.

[4] See Clayton *v.* Corby, 5 Q. B. 415; A.-G. *v.* Mathias, *u.s.*; Bailey *v.* Stevens, 12 C. B. N. S. 91, 113.

[5] 2 & 3 Will. 4, c. 71, s. 1.—"No claim, which may be lawfully made at the common law by custom, prescription, or grant, to any right of common or other profit or benefit to be taken, &c. . . . . shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of 30 years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of 30 years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated, &c."

Sect. 2.—WORKINGS—OTHER CUSTOMARY AND PRESCRIPTIVE WORKINGS.[1]

a. Custom.

(a) Copyholders and their Tenements—Generally.

Copyholder may, by custom, work new mines or quarries in copyhold.

A special custom[2] may be shown to exist in a manor authorising a copyholder of inheritance, without licence from his lord, to open and work new mines or quarries within his tenement;[3] or to dig and take away sand therefrom for the purpose of sale;[4] or to dig and get clay therefrom, for the purpose of making bricks for sale off the manor.[5] And similar customs may be shown to exist in the case of lands held by copy of court roll, not at the will of the lord, but according to the custom of the manor.[6] And such a custom may be good, although the right founded thereon be exercisable without stint or limit.[7] For it is a right exercisable on one's own tenement, and not a right of profit *à prendre in alieno solo*.[8] And it exclusively affects the tenant insisting on it and the lord of the manor. It is not, as in the case of a custom to dig coal or clay without stint out of the waste of a manor,[9] a custom affecting the other copyholders of the manor. It is not, therefore, open to the objection of unreasonableness. It is a custom which might well be supposed to have its origin in a grant.[10]

Immaterial that right exerciseable without limit.

[1] The law as to the customary rights of copyholders in respect of wastes has been already considered: see *ante*, pp. 91, 92.

[2] A copyholder is not entitled to do so *primâ facie*: see *ante*, pp. 72, 73.

[3] See Winchester *v.* Knight, 1 P. Wms. 406; Bourne *v.* Taylor, 10 East, 189; Rowe *v.* Brenton, 8 B. & C. 737; 3 M. & Ry. 133; Parrott *v.* Palmer, 3 M. & K. 632; Hoyle *v.* Coupe, 9 M. & W. 450; Salisbury *v.* Gladstone, 6 H. & N. 123, 129, 130; 9 H. L. C. 692; Aspden *v.* Seddon, 1 Ex. D. 510.

[4] Hanmer *v.* Chance, 4 De G. J. & S. 626.

[5] Salisbury *v.* Gladstone, *u. s.*; Lingwood *v.* Gyde, L. R. 2 C. P. 73, 77.

[6] Portland *v.* Hill, 2 Eq. 765.

[7] See Salisbury *v.* Gladstone, 6 H. & N. 123; 9 H. L. C. 692: see also Hanmer *v.* Chance, 4 De G. J. & S. 626.

[8] Salisbury *v.* Gladstone, 6 H. & N. 129, *per* Wightman, J.; 9 H. L. C. 708.

[9] Which would be bad: see *ante*, p. 92.

[10] See Salisbury *v.* Gladstone, 6 H. & N. 129; 9 H. L. C. 702. See the observations of Lord Cranworth in Salisbury *v.* Gladstone, 9 H. L. C. 701; and of Lord Hatherley in Warrick *v.* Queen's Coll. Oxford, 6 Ch. 722.

Right not affected by Prescription Act.

The 1st section of the Prescription Act, providing that claims by custom shall not, after 30 years' enjoyment, be defeated by merely showing their actual commencement, does not affect a claim by a copyholder to dig minerals out of his copyhold tenement; the section applying exclusively to cases where a person claims a profit *à prendre in alieno solo*.[1] And the 6th section, providing that no presumption shall be made in favour of any claim upon proof of the enjoyment of the right claimed for any period less than that prescribed, merely means that no such presumption shall be made from the bare fact of enjoyment for less than the prescribed period; and does not take away from the fact of such enjoyment its natural weight as evidence; so as to preclude a jury from taking it, along with other circumstances, into consideration as evidence of a grant.[2] Accordingly, where copyholders claimed a customary right to dig and carry away vitreous sand from their tenements, and the evidence was such that an inference of the existence of the custom might be readily drawn therefrom, it was held that it was not necessary to prove that the right had been enjoyed for 30 years.[3]

(β) *Copyholders and their Tenements—Evidence of Custom.*

Evidence of custom.

In every case, however, the onus of establishing the custom relied on lies upon the tenant;[4] and it is often a question of difficulty to determine whether the evidence offered in support of an alleged custom is sufficient. The law has laid down no rule as to the extent of the evidence which is required to establish a custom, or from which the inference of the fact of a custom may be drawn. It is the province of a jury to draw these conclusions of fact.[5] In a suit by the lord of a manor to restrain certain copyholders from digging and taking away white vitreous sand from their tenements, evidence of a custom to dig vitreous sand for twenty-seven years, and of a custom to dig sand generally for a much longer period, was adduced. The acts of the

[1] See Hanmer *v.* Chance, 4 De G. J. & S. 626, 631.

[2] *Ib.*

[3] *Ib.* This decision reversed S.C. 11 L. T. N. S. 667. S. 1 of the Act is cited *ante*, p. 97, n. [5].

[4] Portland *v.* Hill, 2 Eq. 765.

[5] Hanmer *v.* Chance, 4 De G. J. & S. 626, 635.

copyholders had been open and notorious, and the lord had never attempted to exercise any right of forfeiture. It was held, that there was sufficient evidence of a custom to dig vitreous sand to justify the copyholders; although the manor was one of large extent, and no evidence was adduced that the custom extended over the whole of it.[1]

Admissibility of evidence as to adjoining manor.

An alleged right in a copyholder according to the custom of a manor to dig and carry away the coals therein is not proved by producing evidence of a like custom in an adjoining manor although in the same parish and leet.[2] And such right will not be proved, although there be evidence showing, that the latter manor was a subinfeudation of the former, unless it be clearly shown, that the separation took place after the time of legal memory: for otherwise the two manors might have had different immemorial customs.[3] But where no question arises with respect to the right to minerals as between a lord and the tenant, but the only question is with respect to the rights of copyhold miners as between each other, a different rule prevails; the proposed evidence relating, not to the customs of the manor, but to the nature of the tenure of the tenants.[4] Where, therefore, in each of several manors belonging to the same lord and part of the same district, it appeared that there was a class of tenants answering the same description, and to whom their tenements had been granted by similar words, evidence of what rights had been enjoyed by those tenants *inter se* in one manor was received to show what were their rights in another.[5] And in the mining districts of Cornwall and Derbyshire, where the local customs prevail,[6] evidence of what has taken place in one manor may, it seems, be admitted for the purpose of explaining or showing the custom in another; even where the question is with respect to the right to minerals as between a lord and the tenant.[7]

Admissibility of evidence as

Evidence that a copyholder may do one sort of waste, such as

[1] Hanmer *v.* Chance, 4 De G. J. & S. 630, 635: cf. Portland *v.* Hill, 2 Eq. 765.

[2] Anglesey *v.* Hatherton, 10 M. & W. 218.

[3] *Ib.*: cf. Buccleuch *v.* Wakefield, L. R. 4 H. L. 407.

[4] See Anglesey *v.* Hatherton, 10 M. & W. 237, 238.

[5] Rowe *v.* Brenton, 8 B. & C. 737, 3 M. & R. 133.

[6] See *post*, Chapters XVIII., XXI.

[7] Ely *v.* Warren, 2 Atk. 189; Anglesey *v.* Hatherton, 10 M. & W. 237.

cutting timber, is no evidence that he may do another sort of waste, such as digging mines.[1] But a custom empowering copyholders to dispose of one sort of mineral may, in some cases, be evidence of their right to dispose of a different sort of mineral within the same manor.[2] to other kind of waste or other mineral.

A deed more than two hundred years old, made between the lord of a manor of the one part and a number of the copyholders of the other part, which stated in detail various alleged customs, but made no mention of any custom for the copyholders to take minerals; and which was confirmed by a decree in Chancery; was held admissible in evidence against a copyholder deriving title under one of the parties to it, to negative the existence of a custom of the manor for the copyholders to take the minerals under their respective copyholds.[3] And it would probably have been evidence for the same purpose, even against a copyholder not deriving title under any of the parties to it.[4] And the existence of a customary compiled within the period of legal memory is conclusive evidence against the existence of a custom not mentioned therein. Thus, where the customary of a manor, compiled within the period of legal memory, recognised a right in the tenants to dig coal "*propriis usis*;" and it appeared from subsequent documents, that the privilege of digging coal for their own consumption had been enjoyed by the tenants under the waste; but there was no evidence of a similar restricted enjoyment by the tenants under their customary inclosures; and there was evidence of the tenants having during a long period dug coal in the customary inclosures for sale; it was held, that the custom was restricted to digging in the waste for coal for the tenants' own consumption, and that the tenants had no right of digging coal under their customary inclosures.[5] Anglesey *v.* Hatherton. Portland *v.* Hill.

[1] Winchester *v.* Knight, 1 P. Wms. 406; Parrott *v.* Palmer, 3 M. & K. 637.

[2] Winchester *v.* Knight, *u. s.*: but see Rowe *v.* Brenton, Conc. 329. 3 M. & Ry. 363, 364: see Parrott *v.* Palmer, *u. s.*

[3] Anglesey *v.* Hatherton, 10 M. & W. 218.

[4] *Ib.*

[5] Portland *v.* Hill, 2 Eq. 765.

(γ) *Lords and Copyholds.*

Lord may, by custom, work new mines in copyhold.

A special custom may be shown to exist in a manor, authorising the lord to enter upon copyhold lands and work new mines thereunder.[1]

(δ) *Lords and Wastes.*[2]

Doubtful whether lord can by custom work in waste without leaving sufficient common.

Bateson *v.* Green.

Whether a custom justifying the lord of a manor in removing, or authorising another to remove, the soil of the waste, without leaving sufficient common for his commoners, can under any circumstances be considered valid, is open to doubt. In *Bateson* v. *Green*[3] a custom, by which a lord was entitled to dig clay pits in a common, or empower other persons to do so, without leaving herbage for the commoners, was held good: and *Folkard* v. *Hemmett*,[4] and perhaps also *Clarkson* v. *Woodhouse*,[5] are authorities to the same effect. And in *Place* v. *Jackson*[6] it was held, that the lord of a manor was justified by custom in taking stones and gravel out of some commonable hills within the manor without stint. In *Badger* v. *Ford*,[7] on the other hand, it was said, that a custom, which presumed the reservation of a power by a lord at the time of the original grant of the right of common, the effect of which would be to enable the lord to annihilate the right of common altogether, was invalid: and *Hilton* v. *Granville*[8] contains observations of a similar kind. And in *Wilson* v. *Willes*,[9] it was decided, that one copyholder of a manor could not assert a customary right, derivable from his lord, to take turf in an unlimited quantity from the common of the manor, to the prejudice of the rights

Badger *v.* Ford.

[1] Bourne *v.* Taylor, 10 East, 189; Hilton *v.* Granville, 1 Cr. & Ph. 293, 294; Aspden *v.* Seddon, 1 Exch. D. 510. See Eardley *v.* Granville, 3 Ch. D. 832: and cf. Whitechurch *v.* Holworthy, 4 M. & S. 340. The lord has no such right independently of custom: see *ante*, p. 74.

[2] The lord of a manor may, independently of custom, open mines or quarries in the manorial wastes, provided that he do not thereby prejudice the rights of the commoners: see *ante*, p. 76.

[3] 5 T. R. 411.

[4] *Ib.*, 417 n. (a).

[5] 3 Dougl. 189; 5 T. R. 412 n. (a). For a statement of the custom in this case, see *post*, Chap. VII., Part B., Sect. 2, *a*.

[6] 4 Dowl. & Ry. 318.

[7] 3 B. & Al. 153, 155.

[8] 5 Q. B. 701: see pp. 729, 730.

[9] 7 East, 128.

of the other copyholders. And in *Arlett* v. *Ellis*,[1] it was said, after an elaborate criticism of *Bateson* v. *Green*, *Clarkson* v. *Woodhouse*, and *Folkard* v. *Hemmett*, that a custom in a manor, authorising a lord to make, without limit, grants of a waste, in which copyholders had a right of common, would be bad.[2] It will be observed that, in all probability, no assistance can, in the consideration of this question, be derived from considering the law relative to the claim by custom of a copyholder to dig clay without limit out of his copyhold tenement.[3] "It may be that the lord, being the grantor, cannot establish, as a reservation out of his grant, that which, in the absence of production of the grant itself, is plainly unreasonable."[4] *Bateson* v. *Green* may perhaps be reconciled with sound principles by treating the custom there set up as one which was only exercisable at certain fixed periods of the year. The custom set up in *Clarkson* v. *Woodhouse* may possibly be considered good, either as really being for the benefit of the commoners;[5] or as being a custom, which was confined to a particular portion of the waste land in question. And that set up in *Folkard* v. *Hemmett* may possibly be considered good, on the ground of its having been sanctioned by the homage of the manor.[6] Unless, however, these are sound distinctions, these decisions, and also the decision in *Place* v. *Jackson*, can hardly, it is conceived, be considered good law.[7]

He perhaps may, if bound to make compensation.

It does not follow, that a custom, justifying the lord of a manor in removing the soil of the waste, without leaving sufficient common, would be bad, if it were part of the custom, that the lord should make compensation for all damage.[8]

Wanton working.

In any event, whether a custom by a lord to dig without

[1] 7 B. & C. 346.

[2] *Per* Bayley, Holroyd & Littledale, JJ.: see also Hall *v.* Byron, 4 Ch. D. 667, 678, 679.

[3] Such a claim may be supported, see *ante*, p. 98.

[4] Hall *v.* Byron, 4 Ch. D. 679, *per* Hall, V.C.

[5] See a statement of the custom, *post*, Chap. VII., Part B., Sect. 2, *a*.

[6] See the observations on these cases in Arlett *v.* Ellis, 7 B & C. 365 to 368, *per* Bayley, J.

[7] See also Wakefield *v.* Buccleuch, 4 Eq. 639–643, *per* Malins, V.C. It should, however, be observed, that Bateson *v.* Green was cited by Lord Chelmsford, with apparent approval, in Salisbury *v.* Gladstone, 9 H. L. C. 709. See also Hilton *v.* Granville, 1 Cr. & Ph. 293, 294, *per* Lord Cottenham.

[8] See and consider Buccleuch *v.* Wakefield, L. R. 4 H. L. 396: but see pp. 406, 407.

stint be valid or not, the digging must be *bonâ fide*. The lord may be restrained if he digs wantonly.[1]

(ε) *Concurrent Customs.*

Concurrent customs.

There may, in respect of mines, be two concurrent customs in a manor, one in favour of the lord, and the other in favour of the copyholders. Thus, in *Curtis* v. *Daniel*,[2] it was decided, that the lord of a manor in Cornwall might, by acts of ownership, establish his right to all tin mines within the manor, as well under the freehold tenements as under the customary tenements and the wastes; and, that consistently therewith, the tenants of certain tenements in a vill within the manor, some of them freehold and some customary, might, by acts of ownership for more than 20 years, establish their right to copper mines, as well under the waste and customary lands, as under the freehold lands within the vill.

b. Prescription.

Lord may by prescription work in copyhold.

The lord of a manor may be entitled by prescription to enter upon the copyhold tenements, and dig for and get the minerals; making compensation to the copyholders for all damage which he causes.[3]

Sect. 3.—WORKINGS—MATERIALS FOR ROADS.[4]

Highw. (Turnp.) Act.

The Highways (Turnpike) Act, 3 Geo. 4, c. 126, empowers surveyors to the trustees or commissioners of any turnpike road to search for, dig, and carry away any materials for making or repairing turnpike roads: (1), out of any common, river, or brook (not being within 50 yards of any bridge, dam, weir, or jetty), or out of any waste, or common, in any parish, hamlet, or place in which any part of such road may lie, or in any adjoin-

[1] Place *v.* Jackson, 4 D. & Ry. 318.

[2] 10 East. 273.

[3] See Paddock *v.* Forester, 3 M. & G. 903. It was in the same case held, that a plea, stating the prescription, should state it with the qualification as to compensation.

[4] These cannot usually be taken under custom: see *ante*, p. 91.

ing parish, hamlet, or place; and (2), out of the land of any persons where the same may be found in any such parish, hamlet, or place (not being a garden, yard, park, paddock, planted walk, or avenue to any house, or any piece of ground planted and set apart as a nursery for trees). And it empowers them (3) to deposit or carry materials on or through inclosed lands (not being a garden, &c.), or open lands, on paying for all damage. In exercise of the first of these powers no payment need be made for the materials taken, but all damage to lands in private hands must be paid for. Before exercising the second in respect of inclosed lands, notice must be given to the owner to show cause against the same before two justices, who may decide in the matter; and, in exercising it, satisfaction must be made to the owner for the materials taken and for damage done. Differences as to payments or damage are determinable by two justices;[1] but no greater satisfaction can be awarded for the materials taken than their actual saleable value.[2] If surveyors make pits or holes in getting materials, they are bound under penalties to fill them up or fence them off, or otherwise secure them against accidents to persons or cattle.[3] In an action to restrain an injury arising from digging gravel pits for repairing turnpike roads, the trustees of the roads are necessary parties as well as the surveyor under whose directions the works are carried on.[4]

Gen. Highw. Act.

The General Highways Act, 5 & 6 Will. 4, c. 50, empowers surveyors of parishes, in any waste or common, river, or brook, within their parishes, and, if necessary, within other parishes, wherein materials are likely to be found, to dig and carry away the same; so that they do not divert or interrupt the course of the river or brook, or damage any building, highway, or ford, or get the same out of any river, or brook, within 150 feet from any bridge, dam, or weir: and also empowers them, upon obtaining the consent of the owners, or the licence of two justices, to gather stones: without making satisfaction for their value, but

[1] Ss. 97, 98: see 4 & 5 Vict. c. 51. Persons, who remove the materials before the surveyors have discontinued digging, are liable to penalties: 3 Geo. 4, c. 126, s. 101.

[2] 7 & 8 Geo. 4, c. 24, s. 15.

[3] 3 Geo. 4, c. 126, ss. 97, 99.

[4] Weeks v. Heward, 10 W. R. 557.

making satisfaction for damage done by carrying them away.[1] The provision as to gathering stones applies to inclosed lands.[2] But none of the provisions extend to the sea-beach, where the removal of the materials would cause damage by inundation or increased danger of encroachment by the sea.[3] If sufficient materials cannot be found under the lastly mentioned powers, surveyors may, by the authority of the justices, search for, dig, and get them in or through the several or inclosed lands (not being a garden, yard, avenue to a house, lawn, park, paddock, or inclosed plantation, or inclosed wood not exceeding 100 acres in extent); making such satisfaction to the owners for the materials and for the damage done as shall be settled by the justices.[4] And they may so dig and get them, although they must carry them away by an "avenue to a house;" the exception of a "garden, yard, avenue to a house," &c., referring only to the digging or getting of the materials, and not to the carrying of them away when got.[5] But notice must be given before materials can be taken from inclosed lands; and if the owner shows cause against the removal, two justices may decide thereon, and may give the necessary authority to the surveyor.[6] Before materials can be taken from any of the Crown woods or forests, the consent in writing of the Commissioners of Woods must be obtained.[7] And before materials can be taken from any part of a common required to be preserved as an open space, and not set apart for the purpose of taking such materials with the sanction of parliament, the consent of the persons having the regulation or management thereof, or an order of the justices, must be obtained.[8] If surveyors make pits or holes in getting materials, they are bound under penalties to fill them up or slope them down, and fence them off:[9] and in addition to their liability to civil proceedings, they are liable to penalties, if they damage any bridge, mill, building,

[1] S. 51. Cf. Ellis *v.* Bromley, Loc. Bd., W. N. 1876, pp. 78, 156; where the defendants were held entitled, under a private Inclosure Act, to follow a stratum of gravel in a pit in a lateral direction, and to dig it out.

[2] Alresford, &c. Authority *v.* Scott, 7 Q. B. D. 210.

[3] S. 52.

[4] S. 54.

[5] Ramsden *v.* Yeates, 6 Q. B. D. 583.

[6] S. 53: see 4 & 5 Vict. c. 51. Persons, who remove the materials before the surveyors have discontinued digging, are liable to penalties: 5 & 6 Will. 4, c. 50, s. 47.

[7] 10 Geo. 4. c. 50, s. 106.

[8] 39 & 40 Vict. c. 56, s. 20.

[9] 5 & 6 Will. 4, c. 50, s. 55.

dam, highway, occupation road, ford, mines, or tin works.[1] Trespass will not lie against a surveyor for entering lands, even although he has not tendered amends for the injury done; the justices being the proper persons to settle the damages to be paid.[2] The authority granted by the justices does not continue indefinitely, but is limited to the necessities of the occasion in respect of which it is granted.[3] Under an Inclosure Act empowering the appropriation of particular closes for the getting of stone and gravel and other "materials" for the repair of the highways and other roads to be set out by virtue of the Act, and for the use of the inhabitants of a particular parish, it was held, that the parishioners were not entitled to take stones for the purpose of burning them into lime for manure.[4]

Rail. Cl. Cons. Act.

The Rail. Cl. Cons. Act, 1845,[5] empowers a railway company, without previous payment, to take temporary possession of land, not being more than 200 yards distant, and not being a garden, orchard, or plantation attached to a house, nor a park, planted walk, avenue or ground ornamentally planted, and not being nearer than a prescribed distance to the mansion-house of the owner of such land, for the purpose of taking earth or soil by side cuttings therefrom, or of obtaining materials therefrom for the construction or repair of the railway, or of the accommodation works connected therewith. But no stone or slate quarry, brick field, or other like place worked or used for getting materials for sale or disposal can be so taken or used.[6] And the company must give previous notice to the owner; and the owner may object that the land is essential to be retained; and two justices may order that the land and materials be not taken, and that other lands be taken.[7] And the company must, before using the land, separate it by proper fences and gates from the adjoining lands; and the materials must be taken in such manner as the owner's surveyor may direct; and the owner may compel the company to purchase the land in ques-

[1] S. 57.

[2] Peters *v.* Clarson, 7 M. & G. 548.

[3] Manvers *v.* Bartholomew, 4 Q. B. D. 5.

[4] Rylatt *v.* Marfleet, 14 M. & W. 233. The Pub. Health Act, 1875, does not authorise local bodies acting under its provisions to dig holes in a public thoroughfare, in order to help themselves to water: see Edwards *v.* Jolliffe, W. N. 1877, p. 120.

[5] 8 & 9 Vict. c. 20.

[6] S. 32.

[7] Ss. 33–37.

tion.[1] And the company must make full compensation for the value of all clay, stone, gravel, and sand taken, and for all damage done, and may be required to give sureties for the payment thereof.[2] These provisions apparently apply to the case of a company, who are already in possession of a surface, and who are desirous of taking the underlying earth or soil.[3]

Sect. 4.—USER.

Lord of manor may have right of user, by custom, or prescription.

The lord of a manor may be entitled by custom to enter upon the surface of the copyholds or the customary freeholds, and to dig pits therein for the purpose of working the mines,[4] or to deposit thereon earth or rubbish;[5] or to use a portion of the subsoil for the carriage of the minerals;[6] either unconditionally, or upon the terms of making compensation for all damage.[7] And the lord of a manor may be entitled, either by custom or by prescription, to dig pits upon the surface of the waste lands of the manor for the purpose of working the underlying mines or quarries,[8] with the incidental right to deposit earth or rubbish upon such surface.[9] However, a customary user of copyholds, in order to be good, must not be without limitation. If, therefore, it involves a right which might be exercised, so as to render a copyhold tenement useless for the tenant, it will be bad. Thus, in an action brought by the customary tenant of a manor, the following custom was alleged. It was said, that whenever the lord of the manor, or his tenants of collieries within the manor, sank pits in the freeholds of the manor for the purpose of working the collieries, he and they had been accustomed to throw the earth,

But custom as to copyholds, subject to restriction.

[1] Ss. 40, 41, 42.

[2] Ss. 39, 43.

[3] See Loosemore *v.* Tiverton, &c. R. C. 22 Ch. D. 34, 43.

[4] Ballacorkish. &c. Co. *v.* Harrison, L. R. 5 P. C. 59. It does not, however, appear, whether the custom was one exercisable by the lord of the manor as such. See also Eardley *v.* Granville, 3 Ch. D. 832.

[5] See Ballacorkish, &c. Co. *v.* Harrison, *u. s.*, 59, 60.

[6] See Eardley *v.* Granville, *u. s.*, 833.

[7] See Ballacorkish. &c. Co. *v.* Harrison, *u. s.*; Eardley *v.* Granville, *u. s.*, 826, 833: see also Great Laxey Mining Co. *v.* Clague, 4 App. Cas. 115, 116; A.-G. *v.* Mylchreest, *ib.* 309.

[8] Rogers *v.* Taylor, 1 H & N. 706.

[9] *Ib.*

stones, coals, &c., coming from such pits together in heaps on the land, being customary tenement of the manor, "near to such pits there to remain and continue," and to place wood there for the necessary use of the pits, and to take away from thence part of the coals so placed there, and to burn other part of such coals "at his and their free will and pleasure." It was held, that this custom was bad, as being uncertain and unreasonable.[1]

[1] Broadbent *v.* Wilks, Willes, 360; Wilkes *v.* Broadbent, 1 Wils. 63; 2 Str. 1224.

CHAPTER VI.

WORKING AND USER AS BETWEEN CO-OWNERS AND PARTNERS.

SECT. 1.—CO-OWNERSHIP WITHOUT PARTNERSHIP EITHER IN WORKING OR LAND.

a. Possession and Working—Generally.

Every co-owner entitled to work.

ANY joint tenant, tenant in common, or coparcener, of a mine or quarry, is entitled to enter upon and work it.[1] "No authority has been referred to, and I believe none can be found, to say that the rights of tenants in common in a mine are not as extensive as can be suggested for each of those tenants to do what he wills with the undivided property, provided always that he does not take more than his share." . . . . "How is a tenant in common to enjoy his share (if that is the right expression) of the common property in a coal mine, if he is not at liberty to dig and carry away the coal?"[2]

Remedies for interference with right—generally.

In case of actual ouster, the injured party may recover possession of his undivided share;[3] and he may recover mesne profits;[4] or charge the wrongdoer with an occupation rent.[5] And he may recover damages either where there is actual ouster, or where the common property is destroyed by the act of the co-owner.[6] Unless, however, in case

[1] See and consider Goodwyn *v.* Spray, 2 Dick. 667; Denys *v.* Shuckburgh, 4 Y. & C. Eq. Ex. 42; Griffies *v.* Griffies, 8 L. T. N. S. 758; Jacobs *v.* Seward, L. R. 5 H. L. 464; Job *v.* Potton, 20 Eq. 84, 93, 94, 97. See also Co. Litt. 199 b, 200 b. Perens *v.* Johnson, 3 Sm. & G. 427, does not contain anything to the contrary. Cf., as to Letters Patent, Mathers *v.* Green, 1 Ch. 29.

[2] Job *v.* Potton, 20 Eq. 84, 93, *per* Bacon, V.-C.; in effect overruling several of the dicta in Wilkinson *v.* Haygarth, 12 Q. B. 837. Ackroyd *v.* Briggs, 14 W. R. 25, is no authority to the contrary of Job *v.* Potton; its facts being apparently entirely misstated: see the report in 15 L. T. N. S. 521.

[3] Co. Litt. 199 b.

[4] Denys *v.* Shuckburgh, 4 Y. & C. Eq. Ex. 51.

[5] McMahon *v.* Burchell, 2 Ph. 127; Pascoe *v.* Swan, 27 Beav. 508.

[6] Trespass and trover formerly lay: see Jacobs *v.* Seward, L. R. 5 H. L. 464, 472, *et seq.*; *Re* Smith. 10 Ch. 85.

of actual ouster, or unless the common property is destroyed, none of these remedies can, in general, be obtained. For, if it is the right of the person seeking the remedy to enter upon and work the mine or quarry, it is equally the right of the person against whom he seeks it to do so. Where two or more persons are co-owners of a mine or quarry, without more, and disputes take place between them, a receiver and manager will not, as a general rule, be appointed at the instance of one of them.[1] It would seem, however, that, where a plain case of exclusion or interference is established, the appointment would be made.[2] At all events, if the applicant seeks by his action a partition or sale, he will be entitled to the appointment of a receiver and manager, even on interlocutory application;[3] and in an action so framed, the appointment may be obtained, if a case of mere occupation, without exclusive occupation, is established.[4]

Receiver and manager.

No co-owner is entitled to work in an improper or unskilful manner amounting to destructive waste.[5] If he does, he may be restrained by injunction.[6]

Destructive waste.

b. Account and Contribution.

And no co-owner is entitled to appropriate more than his share of the produce.[7] If he does, an action for an account will lie against him.[8] The appropriation of an amount beyond a

Every co-owner entitled to account.

[1] See Roberts *v.* Eberhardt, Kay, 148, 158, 159. The contrary was formerly laid down: see Jefferys *v.* Smith, 1 J. & W. 203; Wynget *v.* Heathcote, cited in Bentley *v.* Bates, 4 Y. & C. Eq. Ex. 187.

[2] See Sandford *v.* Ballard, 33 Beav. 401; which, however, was a case of surface property.

[3] This would have been so even before the Jud. Acts: for, in an action so framed, it could not have been objected that the appointment might be of indefinite duration: see and consider Roberts *v.* Eberhardt, *u. s.*

[4] See Porter *v.* Lopes, 7 Ch. D. 358, a case of surface property. The law was otherwise before the Jud. Acts. Of course, if a receiver only is appointed, the working of the mine is stopped: if it is desired to continue the working, a manager, as well as a receiver, is necessary: *Ex parte* Cambrian Co., 14 Ch. D. 653.

[5] See Hole *v.* Thomas, 7 Ves. 589; Wilkinson *v.* Haygarth, 12 Q. B. 837; Arthur *v.* Lamb, 2 Dr. & Sm. 428; Job *v.* Potton, 20 Eq. 84.

[6] *Ib.*

[7] Denys *v.* Shuckburgh, 4 Y. & C. Eq. Ex. 42; Jacobs *v.* Seward, L. R. 5 H. L. 464, 475, 478; Job *v.* Potton, *u. s.*, 93.

[8] *Ib.*; *Re* Smith, 10 Ch. 85. Prior to the Jud. Acts such account might have been obtained either in equity by bill, or at law by action under the Act 4 & 5 Anne. c. 3. s. 27: see Denys *v.* Shuckburgh, *u. s.*

man's proper share of the produce refers, however, to his share of the net produce, deducting all expenses incident to the working.[1] Indeed, an improper appropriation must be understood to mean an appropriation by reference to the rent or royalty which a stranger would pay.[2] A co-owner, who expends his capital in a hazardous speculation like mining or quarrying cannot, in general, be called upon to account for any share of the profits he may make by so doing.[3]

Not in general to lien or contribution.

On the other hand, if one co-owner chooses, without any agreement with the others, to enter on and work the mine or quarry, he has not, in respect of his expenses, a lien on the share of the others;[4] nor can he, in case of loss, call upon them for a contribution.[5] But it may be otherwise, if the working takes place with the acquiescence of the others, and the expenses have been incurred in procuring necessaries.[6]

c. Pledging Credit.

Co-owners in general partners as regards third parties.

Whatever relation may be occupied by them *inter se*, it seems hardly possible for two or more co-owners of a mine or quarry, if they in conjunction work it, and sell the produce, to avoid holding themselves out to the world as, and subjecting themselves to all the consequences of being, partners as well in the land as in the profits of the working.[7]

Sect. 2.—CO-OWNERSHIP OF LAND, BUT PARTNERSHIP IN WORKING.

a. Possession and Working—Generally.

Every partner entitled to work.

Where two or more persons are partners in the working of a mine or quarry, without being partners in the mine or quarry itself, any partner is entitled to enter upon and work it in a

[1] See Job *v.* Potton, 20 Eq. 97, 98.

[2] See *ib.* 84, 97, where the mine in question was in lease.

[3] See and consider Henderson *v.* Eason, 17 Q. B. 701.

[4] See and consider Fereday *v.* Wightwick, 1 R. & My. 45, 49, 50; cf. Kay *v.* Johnston, 21 Beav. 536.

[5] Henderson *v.* Eason, 17 Q. B. 701, 721.

[6] See Scott *v.* Nesbitt, 14 Ves. 445; Sayers *v.* Whitfield, 1 Knapp. P. C. 149.

[7] See and consider Crawshay *v.* Maule, 1 Swanst. 523.

practicable and feasible way.[1] He will not, however, against the will of the others, be allowed to send a separate set of miners down a shaft to work his own share only of a mine. For if every partner did this, it would be practically impossible to continue the working.[2] There would, in fact, in such a case, be a direct interference with the others.[3] Any such partner is entitled in an action seeking for dissolution and accounts, if he can show exclusion, or disagreement between the partners as to the proper method of working, to obtain on interlocutory application an order for a receiver and manager of the whole mine or quarry.[4] Where, however, dissolution and accounts are not sought for, an order on interlocutory application for a receiver and manager will not in general be obtained.[5] Nor even in an action seeking dissolution and accounts will such an order be obtained, unless the applicant can show exclusion or interference ;[6] or, at all events, inability to agree upon a plan for the working :[7] and it is not sufficient to show mere negative want of co-operation.[8] An injunction may of course also be obtained in an action seeking for dissolution and accounts to restrain interference.

Receiver and manager.

Injunction.

b. Account and Contribution.

Of course, no such partner is entitled to appropriate more than his share of the produce.[9] If he does, the other partners may

Every partner entitled to account.

[1] See and consider Jefferys *v.* Smith, 1 J. & W. 302 ; Roberts *v.* Eberhardt, Kay, 148, 159, 161, 162, 163.

[2] See Jefferys *v.* Smith, *u. s.*; Tatam *v.* Williams, 3 Ha. 355 ; Roberts *v.* Eberhardt, *u. s.*, 156, 157.

[3] See Roberts *v.* Eberhardt, *u. s.*, 162, 163.

[4] Crawshay *v.* Maule, 1 Swanst. 495, 507, 527, 529 ; Jefferys *v.* Smith, *u. s.*, 302 ; Roberts *v.* Eberhardt, *u. s.*, 148, 155 : cf. Bentley *v.* Bates, 4 Y. & C. Eq. Ex. 182.

[5] Roberts *v.* Eberhardt, *u. s.*, 155, 158, 159, 160.

[6] *Ib.* 161, 162. As to what will constitute interference, see *ib.*

[7] See and consider Lees *v.* Jones, 3 Jur. N. S. 954.

[8] Roberts *v.* Eberhardt, *u. s.*, 161, 163. For the form of an order which in a proper case will be made, see Clegg *v.* Fishwick, Set. 417, 418 ; Clarke *v.* Smith, *ib.* 418 ; Jefferys *v.* Smith, *ib.* (where the order ran "himself or such other person as he should think fit being a practical miner") ; Rodewald *v.* Wayne's Merthyr, &c. Works, *ib.* 418, 419, (where special provision was made as to debts).

[9] See Bentley *v.* Bates, *u. s.*, 182 ; Roberts *v.* Eberhardt, *u. s.*, 158, 159 ; Clegg *v.* Clegg, 3 Giff. 322.

obtain an account against him. And they may do so without seeking a dissolution.[1] For the necessity of seeking a dissolution, in order to take an account, applies only to mercantile concerns strictly so called. And mining concerns, although mercantile for some, are not so for all, purposes.[2] The extent to which, in such a case, appropriation will be disallowed is illustrated in *Clegg* v. *Clegg*.[3] There A., B., and C., were tenants in common of mines; A. being entitled to one moiety, and B. and C. to the other in equal shares. Part of the surface belonged in severalty to A., and the other (called Bent Grange) to B. and C. in equal shares. Under the terms of an agreement with them, a lessee under A., B., and C., sank a shaft to the mines through Bent Grange for the purpose of working them. He subsequently used the shaft for the carriage of foreign coal. In a suit by A. against B., C., and the lessee, it was held, that the shaft having been made by a person, who was lessee not merely of B. and C. but of A., must, although made upon ground which was the separate property of B. and C., be considered to have been in effect made at the common expense of all the lessors. A decree was, accordingly, made declaring the title of A. to a moiety of the profit earned in respect of the carriage of the foreign coal.

And to contribution and lien.

If any such partner incurs proper and necessary expenses in the working; or incurs expenses to preserve the mine from a calamity, such as drowning; he is entitled to have them deducted out of the joint profits before any division takes place.[4] He is also entitled, in case the working results in a loss, to call upon the other partners for a contribution.[5] And, if, in the course of the working, one of such partners becomes indebted to another, the creditor has a lien on the debtor's share in the concern.[6] And such lien will be enforced against a mortgagee or trustee in bankruptcy.[7] The lien will, however, only extend to the debtor's share in the partnership concern. There can be no lien on the debtor's undivided share in the land.[8]

[1] Bentley *v.* Bates, 4 Y. & C. Eq. Ex. 182: see the observations on this case in Roberts *v.* Eberhardt, Kay, 158, 159.

[2] See Bentley *v.* Bates, *u. s.*, 190.

[3] 3 Giff. 322.

[4] Roberts *v.* Everhardt, Kay, 148, 161, 162.

[5] See Henderson *v.* Eason, 17 Q. B. 701, 721.

[6] Fereday *v.* Wightwick, 1 R. & My. 45; Taml. 250; Kay *v.* Johnston, 21 Beav. 536.

[7] Fereday *v.* Wightwick, *u. s.*

[8] See Lindley, 681, 683.

c. Pledging Credit.

Whatever relation may be occupied by them *inter se*, it seems hardly possible for two or more co-owners of a mine or quarry, who work it in partnership, to avoid holding themselves out to the world as, and subjecting themselves to all the consequences of being, partners in the land.[1]

Co-owners in general partners as regards third parties.

SECT. 3. ORDINARY PARTNERSHIP.[2]

a. Possession and Working—Generally.

Any ordinary partner in the working of a mine or quarry, and also in the land itself, is entitled to enter upon the mine or quarry and work it, and he cannot be prevented from so doing by the others. But he must work it in a practicable and feasible way, and not in a wasteful way.[3]

Every partner entitled to work.

Any such partner is, in general, entitled, in an action seeking for dissolution and accounts, if he can show exclusion, or waste, or disagreement between the partners as to the proper method of working, to obtain, on interlocutory application, an order for a receiver and manager of the mine or quarry.[4] And the mortgagee of a partner has a similar right against the other partners.[5] Even before the Jud. Acts this was so; mining operations having always been regarded as a species of trade.[6] Where, however, dissolu-

Receiver and manager.

[1] See Crawshay *v.* Maule, 1 Swanst. 523.

[2] Of course it does not follow, that, where two or more persons take a lease of a mine for a specified period for partnership purposes, the duration of the partnership is co-extensive with that period: see Jefferys *v.* Smith, 1 J. & W. 301; Crawshay *v.* Maule, 1 Swanst. 508, 516, 521, 522, 526. Where there is a conflict of evidence, the onus of establishing that there is more than a partnership at will lies upon him who asserts that fact: Burdon *v.* Barkus, 3 Giff. 412; 4 De G. F. & J. 42.

[3] See and consider Norway *v.* Rowe, 19 Ves. 157, 159; Crawshay *v.* Maule, 1 Swanst. 495, 507, 526, 529; Jefferys *v.* Smith, 1 J. & W. 302; Rowe *v.* Wood, 2 *ib.* 556, 558; Roberts *v.* Eberhardt, Kay, 148, 161, 162.

[4] See *ib.*: cf. Clegg *v.* Fishwick, 1 M. & G. 294. For the form of the order, see *ante*, p. 113, n. [8].

[5] See Bentley *v.* Bates, 4 Y. & C. Eq. Exch. 182, 187.

[6] See Jefferys *v.* Smith, 1 J. & W. 302: see also, *ante*, p. 57, n. [2], and other cases there cited.

tion and accounts are not sought, such an order will not, in general, be obtained.[1] Nor even, in an action seeking dissolution and accounts, will such an order be obtained, unless the applicant can show exclusion or interference,[2] or clear mismanagement of a particular and specified nature;[3] or, at all events, inability to agree upon a plan for the working;[4] and it is not sufficient to show mere negative want of co-operation.[5] *A fortiori*, such an order will not be obtained, where dissolution is not sought for, and the application is made on behalf of a lunatic. For it would be unjust to compel any person to carry on a partnership with the committee of a lunatic, and thereby subject him to the necessity of having every question as to outlay in the management determined by the Court.[6] However, under very special circumstances a receiver and manager may be appointed on interlocutory application, even in an action which does not seek for dissolution. Thus, in *Sheppard* v. *Oxenford*,[7] the defendant was the managing partner of a concern constituted in this country for the purpose of working mines in the Brazils, and he was also the trustee of the partnership property. The operations of the concern were unsuccessful, and he alleged that it had become largely indebted to him. The plaintiff, who was one of his co-partners, filed a bill for an account, a receiver and manager, and other relief, but not for a dissolution. The plaintiff gave notice of motion for a receiver; but, before the motion could be disposed of, the defendant left England clandestinely, and proceeded to the Brazils for the purpose of selling a portion of the property. A receiver and manager was appointed; the Court observing, that the defendant could not, notwithstanding that there might be a considerable sum owing to him, be allowed to take advantage of his mere legal right to sell.[8]

[1] Roberts *v.* Eberhardt, Kay. 148, 158, 159, 160; Rowlands *v.* Evans, Williams *v.* Rowlands, 30 Beav. 302.

[2] Roberts *v.* Eberhardt, *u. s.*, 161, 162. As to what will constitute interference, see *ib.*

[3] Rowe *v.* Wood, 2 J. & W. 556. Dissolution was not prayed for, but the refusal of the application was not put upon that ground.

[4] Jefferys *v.* Smith, 1 J. & W. 298, 302; Lees *v.* Jones, 3 Jur. N. S. 954.

[5] Roberts *v.* Eberhardt, *u. s.*, 148, 161, 163.

[6] Rowlands *v.* Evans, Williams *v.* Rowlands, 30 Beav. 302, 310.

[7] 1 K. & J. 491.

[8] The receiver and manager was ap-

Whatever may be the rights of a person, who is the mortgagee of another person,[1] if afterwards he also becomes his partner, he is bound to have regard not merely to his position as mortgagee, but to his position as partner.[2] Having regard to the latter position, he cannot wholly exclude the mortgagor from interference; and he must keep regular accounts of his receipts and payments and other transactions in relation to the mine, and allow the mortgagor constant access for the purpose of inspecting them.[3] But if he complies with his obligations in these respects, he will not have a receiver and manager appointed against him.[4] Same person mortgagee and partner.

If one of two or more partners in a mining concern wishes to obtain an order for the appointment of a receiver and manager, he must, in consequence of the fluctuating value of mining property, be prompt to take the proper steps; and if he neglects to do so until the mine has proved profitable, he will be deprived of his right.[5] Delay.

In an action not seeking for dissolution, an injunction may be obtained to restrain a partner from improperly selling the property of the partnership.[6] Injunction against sale.

b. Account—Trusts—Contribution.

(a) *Account—Generally.*

Of course, no partner is entitled to appropriate more than his share of the produce.[7] If he does, the other partners may obtain an account against him;[8] and without seeking a dissolution.[9] A mortgagee in possession being bound to account on the footing of wilful default, and a partner not being so bound, it is doubtful upon what principle a person ought to account Every partner entitled to account.

pointed both in this country and in the Brazils. For the form of the order, see 1 K. & J. 501; Set. 419.

[1] See *ante*, pp. 82 *et seq.*

[2] Rowe *v.* Wood, 2 J. & W. 556, 557.

[3] *Ib.* 558, 559.

[4] *Ib.* 559.

[5] See Sheppard *v.* Oxenford, 1 K. & J. 497, 498.

[6] See *ib.*, 500.

[7] Bentley *v.* Bates, 4 Y. & C. Eq. Ex. 182.

[8] Clegg *v.* Edmondson, 8 De G. M. & G. 811, 814.

[9] Bentley *v.* Bates, *u. s.*, 182; *ante*, p. 114. See the observations on this case in Roberts *v.* Eberhardt, Kay, 158.

who unites in himself the two characters.[1] To every action for an account all the partners should be parties.[2]

Rights of mortgagee of partner.

The mortgagee of a partner in a mine or quarry has a right to an account against the other partners.[3] He is also entitled, in default of payment, to the usual foreclosure judgment.[4] And, consequent upon the latter relief, he is entitled to have an account taken of the profits of the concern made since the issue of the writ: to have an account taken of what the debts and liabilities of the concern consist; and to have it ascertained, as between him and the other partners, what proportion of such debts and liabilities is properly attributable to the share mortgaged to him.[5] Such share cannot, moreover, as between him and the other partners, if they knew of and assented to the mortgage, be affected by any burdens, which were not thrown upon it by some contract in force at the time when the mortgage was effected.[6] The mortgagee is not, however, in having the account taken, entitled, as against the other partners, to any account of profits paid or distributed before the issue of the writ.[7] Nor is he entitled to contest the propriety of the way in which previous calls made upon the other partners in respect of their shares have been applied; or to require the other partners to account for their previous management of the concern.[8] In case the instrument under which the partners have worked contains a clause of preemption, the other partners are entitled, in the events of a foreclosure judgment being obtained against the mortgagor, and of his being absolutely foreclosed, to have a day fixed, within which they or some or one of them may redeem the mortgage.[9] And, in such a case, inasmuch as each of the other partners is entitled to see that the amount, upon payment of which he is entitled to redeem the mortgage, is properly ascertained, he is a necessary party to an action by the mortgagee to realize his security.[10]

[1] The point was mooted, but not decided, in Rowe *v.* Wood, 2 J. & W. 556, 557.

[2] See Sibley *v.* Minton, 27 L. J. Ch. 53.

[3] Bentley *v.* Bates, 4 Y. & C. Eq. Exch. 182: see also Redmayne *v.* Forster, 2 Eq. 467, 477. Cf. Watson *v.* Eales, 23 Beav. 294.

[4] Redmayne *v.* Forster, *u. s.*: cf. Watson *v.* Eales, *u. s.*

[5] Redmayne *v.* Forster, *u. s.*, 477, 478.

[6] *Ib.*, 477.

[7] *Ib.*

[8] *Ib.*

[9] *Ib.*, 477, 478.

[10] *Ib.*, 478.

(β) *Trusts—Generally.*

Constructive trustee.

If a mine or quarry is held upon lease by a partnership, and any partner before or upon the expiration of the lease obtains a renewal of it in his own name, he will be a trustee of it for the partnership.[1] And the fact that the partnership is at will, or that the lessor would not have renewed to the co-partners, is immaterial.[2] And the mere communication of the intention to apply for the renewal is also immaterial; especially if the person making it is the managing partner.[3]

(γ) *Contribution.*

Every partner entitled in general to contribution and lien.

If any partner in a mine or quarry incurs proper and necessary expenses in the working; or incurs expenses to preserve the mine from a calamity, such as drowning; he is entitled to have them deducted out of the joint profits before any division takes place.[4] He is also in general entitled, in case the working results in a loss, to call upon the other partners for a contribution.[5] And it is in general immaterial, that the loss should consist of damages given against him for a partnership act.[6] But not so, where the loss is due to his own personal misconduct, or gross negligence. Thus, where a managing partner, although without knowingly trespassing, worked beyond the limits of a colliery without proper inquiry as to the limits; and continued his workings after notice that he was trespassing, without consulting his partners, and when it was evident both

[1] Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Senhouse *v.* Christian, cited 19 *ib.* 157, 159; 19 Beav. 356, n., 357 n.; Clegg *v.* Fishwick, 1 M. & G. 298; Clegg *v.* Edmondson, 8 De G. M. & G. 787; Clements *v.* Hall, 2 De G. & J. 173, 186, 189, which reversed S. C. 24 Beav. 333: see also Norway *v.* Rowe, 19 Ves. 159.

[2] Clegg *v.* Edmondson, *u. s.*

[3] *Ib.* For the form of the declaration, which will be made in such a case, see Clegg *v.* Fishwick, Set. 1200. An inquiry was directed in Clements *v.* Hall, *u. s.*, of what the testator's interest consisted at his death, and whether it had determined, and if so how; the testator having been the cestui que trust: see Set. 1215.

[4] Roberts *v.* Eberhardt, Kay, 148, 161, 162; Burdon *v.* Barkus, 4 De G. F. & J. 51: cf. Kay *v.* Johnston, 21 Beav. 536.

[5] See German Mining Co., 4 De G. M. & G. 41, 42. See also Henderson *v.* Eason, 17 Q. B. 701, 721.

[6] Thomas *v.* Atherton, 10 Ch. D. 199.

that his right to work was extremely doubtful, and that the profits to be expected from so doing were small; it was held, that the other partners were not liable to contribute to a sum awarded as damages for the trespass.[1] If, in the course of the working, one partner becomes indebted to another, the creditor has a lien upon the debtor's share in the concern.[2] And such lien will be enforced against a mortgagee or trustee in bankruptcy.[3] The managing partner of a mine or quarry cannot be made liable for not advancing more money in the working than a prudent owner would have done.[4]

(δ) *Delay.*

Account—delay.

If one of two or more partners in a mining concern wishes to obtain an account; and, if, having a mere equitable interest, to give effect to which the aid of the Court is necessary, he wishes to obtain that aid; he must, having regard to the fluctuating and hazardous character of mining operations, be prompt in asserting his claim. And, if for a considerable time, during which the mining operations have been unprosperous, he has neglected to assert his claim, he will not be permitted to come forward, and claim an account, when the operations become successful.[5] And even if his position is that of a person who has a legal interest, and whose interest it is attempted to disturb, he will not, if he has abandoned his rights for a considerable time, during which the operations have been unprosperous, and during which he has refused to bear a part of the expenses, be allowed to claim an account, when the concern becomes prosperous.[6] And, by analogy to the Statute of Limitations, an abandonment for six years will for this purpose be considered sufficient.[7] If, however, a person who has a legal

[1] Thomas *v.* Atherton, 10 Ch. D. 185, 199, *et seq.*

[2] Norway *v.* Rowe, 19 Ves. 160; Fereday *v.* Wightwick, 1 R. & My, 45; Taml. 250; Kay *v.* Johnston, 21 Beav. 536.

[3] Fereday *v.* Wightwick, *u. s.*

[4] Rowe *v.* Wood, 2 J. & W. 556.

[5] See Clarke *v.* Hart, 6 H. L. C. 633; Rule *v.* Jewell, 18 Ch. D. 660, 663.

[6] See Prendergast *v.* Turton, 1 Y. & C. C. C. 98: affirmed 13 L. J. Ch. 268 (where an interval of eleven years had elapsed); Rule *v.* Jewell, 18 Ch. D. 660. See also Clarke *v.* Hart, *u. s.*

[7] Rule *v.* Jewell, *u. s.*, *per* Kay, J. Cf. Clegg *v.* Edmondson, 8 De G. M. & G. 810.

interest can show, that, throughout the interval during which he had refused to contribute, he had insisted on his rights, and that his rights had been recognised by the other partners, he will not be disentitled to relief.[1] Indeed, to disentitle him, he must be shown to have positively abandoned his rights. Mere laches are not a bar to a person who has a legal interest.[2] But where such a person obtains relief, he can only do so upon the terms of undertaking to bear his due proportion of the expenditure, and of allowing to the other partners interest at £5 per cent. per annum upon the excess of their expenditure beyond their proper proportion.[3]

Trust—delay.

On similar principles the right to enforce a trust of mining property will in many cases be lost unless it is promptly asserted;[4] such property being "subject to extraordinary contingencies," and requiring for its productiveness "a large and uncertain outlay."[5] If, for instance, one of two partners in a leasehold mine, before or upon the expiration of the lease, obtains a renewal of it in his own name; and the other partner, instead of immediately enforcing the trust which thereupon arises in his favour,[6] permits the lessee to continue the working; and neither applies for accounts, nor offers to contribute to the expenses; he will after a time lose his right to relief.[7] And in such a case the mere continual assertion of a claim, unaccompanied by any act to give effect to it, will not be sufficient to keep alive a right, which would otherwise be precluded.[8] It would not have had that effect as against the Statutes of Limitations; and in the case of mining property the Court goes beyond the analogy of the Statutes.[9] And

[1] See Clarke *v.* Hart, 6 H. L. C. 633: affirming Hart *v.* Clarke, 6 De G. M. & G. 232, which reversed Hart *v.* Clarke, 19 Beav. 349. Here an interval of four years had elapsed. Cf. Rule *v.* Jewell, 18 Ch. D. 660, 664, 665.

[2] Clarke *v.* Hart, *u. s.*; Garden, &c. Co. *v.* M'Lister, 1 App. Cas. 39, 57; Rule *v.* Jewell, *u. s.* See also Erlanger *v.* New Sombrero Co., 3 App. Cas. 1282, 1283.

[3] Clarke *v.* Hart, *u. s.*

[4] See Clarke *v.* Hart, 6 H. L. C. 633; Clegg *v.* Edmondson, 8 De G. M. & G. 787; Whalley *v.* Whalley, 2 De G. F. & J. 310, 331.

[5] Clegg *v.* Edmondson, *u. s.*, 787, 808. *per* Turner, L. J.: see also Clements *v.* Hall, 2 De G. & J. 186, 189.

[6] See *ante*, p. 119.

[7] See Senhouse *v.* Christian, cited 19 Ves. 157, 159; 19 Beav. 356 n., 357 n.; Norway *v.* Rowe, 19 Ves. 156, 157; Tatam *v.* Williams, 3 Ha. 356; Clegg *v.* Edmondson, *u. s.*, 787. In the latter case the plaintiff took no step for nine years. See also Clements *v.* Hall, *u. s.*, 186, 187, 188.

[8] Clegg *v.* Edmondson, *u. s.*

[9] *Ib.* 810. Cf. Rule *v.* Jewell, 18 Ch. D. 660, *ante*, p. 120.

it must always in such a case be difficult for a claimant to get rid of the objection of delay by attempting to show, that the mine in question had been tested and explored, and that no uncertainty whatever attached to its value. For no "degree of science foresight and examination affords a sure guarantee against sudden losses disappointments and reverses" in the working of a mine.[1] And the same rule, which applies against a beneficial owner, applies against a personal representative.[2] The objection of delay may, however, be got rid of by the claimant showing, that he has applied for accounts of the working, and that the application has been refused. For, in such a case, he has been kept in ignorance of the circumstances, which were necessary to enable him to decide as to the propriety of insisting on his right.[3] And of course the objection can be got rid of, if the claimant has been under disability.[4] And in doubtful cases the non-communication of the intention to apply for the renewal, or the smallness of the subsequent outlay and profits, is an element in favour of the claimant.[5] The doctrine, that delay is fatal to the enforcement of a trust, does not appear to apply with the same force, where the trust is express, as where it is constructive.[6]

c. Pledging Credit.

(a) Dealings on Credit.

Manager may, *primâ facie*, bind partners by necessary or usual dealings.

The manager of a mining partnership, whether he be a partner or not, may, *primâ facie*, as between the partners generally and the creditor, bind the partners generally by incurring debts for wages and goods and by other dealings on credit for the purpose of working the mine, if such a course appear to be necessary or usual in the management; and such creditor may

[1] Clegg *v.* Edmondson, 8 De G. M. & G. 814, *per* Knight-Bruce, L.J.

[2] See Clements *v.* Hall, 2 De G. F. & J. 186, 188.

[3] See Clements *v.* Hall, 2 De G. & J. 173, 188 (reversing S. C. 24 Beav. 333), *per* Lord Cranworth.

[4] Clegg *v.* Edmondson, *u. s.*, 813.

[5] Clements *v.* Hall, 2 De G. F. & J. 189, 190, *per* Turner, L.J. The latter judge laid it down, that in all cases, where the right to enforce the trust is sought to be defeated, the grounds put forward for defeating it should be watched with jealousy.

[6] See Walker *v.* Jefferys, 1 Ha. 341; Clegg *v.* Edmondson, *u. s.*, 808, 812. Cf. *ante*, p. 121. But see Whalley *v.* Whalley, 2 De G. F. & J. 310.

sue any partner accordingly.[1] And, even, if, in such a case, the concern is being carried on with a smaller amount of capital than the amount agreed on at the time of its formation, the defendant will not be free from liability if he has acquiesced in that course of management.[2] Of course, however, in every such action it must appear, that the defendant is in fact a partner, or has held himself out as such.[3] And if the goods supplied are not necessary or usual in the working, the partners are not liable for their price.[4]

(β) *Borrowing Money.*

Doubtful whether he can bind by borrowing money.

It is doubtful, whether the authority of the manager extends so as to bind the partners by borrowing money on their credit, although such money be applied for the necessary purposes of the mine. In *Burmester* v. *Norris*[5] an action was brought against a company, which had been established for the purpose of purchasing and working mines in Prussia and Bavaria, to recover moneys which had been from time to time lent to the directors, and expended by them in working the mines. The deed of settlement of the company provided, that the capital should be £50,000; and it also provided means for raising additional capital, in case such a course became necessary. It further provided, that the business of the company should be under the sole control of the directors. It was held, that the deed intended the mines to be worked by means of the capital to be subscribed, and that the provision as to control merely referred to the management; that, independently of the deed, the directors had no power to borrow money; and that the action was, consequently, not maintainable.[6] However, in *Ducarrey* v. *Gill*,[7] where the proceeds of a bill drawn by the

[1] German Mining Co., 4 De G. M. & G. 19, 40, 41. The same principle applies in the case of cost-book mines: see *post*. Chap. XIX.. Sect. 3, *a*.

[2] Steigenberger *v.* Carr, 3 Man. & G. 191; 3 Scott N. R. 466. The same principle applies in the case of cost-book mines: see *post*, Chap. XIX., Sect. 3, *a*.

[3] Pott *v.* Eyton, 3 Com. B. 32: cf. Carter *v.* Whalley, 1 B. & Ad. 11.

[4] Copper Miners' Co. *v.* Fox, 16 Q. B. 229.

[5] 6 Exch. 796.

[6] See also German Mining Co., 4 De G. M. & G. 35.

[7] M. & M. 450; 4 C. & P. 121.

managers of a mining concern had been applied for the purposes of the concern, it was held that the defendant, who was a director and shareholder, although not liable on the bill,[1] was liable as for money lent. So, in *Brown* v. *Kidger*.[2] There the defendants were partners in a mining concern, the deed of partnership of which provided a means of raising additional capital to that originally subscribed, in case such a course became necessary. It was thereby also provided, that if any partner should, for any other purpose than the immediate use of the partnership, draw, accept, or indorse any bill of exchange in the name of the firm, the others might, by giving notice, dissolve the partnership. The plaintiff, on the promise of two of the defendants to secure him by a bill in the name of the partnership, paid certain claims against the concern, to enforce which actions had been commenced. The bill was subsequently given, and the action was brought to recover the amount secured. It was held (1) that the defendants who gave the bill had a clear *primâ facie* authority to borrow money for the purposes of the partnership; (2) that the deed could not have intended that until additional capital was raised according to its provisions, the business of the firm should be stopped; and (3) that it implied a power to draw bills, which was more extensive than a mere borrowing power; and that, accordingly, so far from impliedly excluding an authority to borrow money, it impliedly affirmed that authority.[3]

But he probably can.

It is not easy to see why the *primâ facie* position of an ordinary mining partnership or company, as regards the authority of the members to bind each other by borrowing money for the necessary purposes of the concern, should differ from that of other trading partnerships or companies;[4] and it is conceived that *Ducarrey* v. *Gill* and *Brown* v. *Kidger* are more satisfactory decisions than *Burmester* v. *Norris*.[5] At all events, if the moneys in question are not borrowed from strangers, but are

[1] See *infra* (γ).

[2] 3 H. & N. 853.

[3] This seems wholly irreconcileable with Burmester *v.* Norris, 6 Exch. 796, *u. s.*

[4] The law as respects cost-book mines stands upon a different footing: see *post*, Chap. XIX., Sect. 3, *b*.

[5] See, however, the observations of Turner, L.J., in German Mining Co., 4 De G. M. & G. 39 *et seq.*

advanced by some of the partners themselves at the request of the manager or managers, they will be treated as debts due from the partnership;[1] and will, moreover, *primâ facie* be allowed to carry interest.[2] And if the moneys in question are advanced by the managers, they may be entitled to be indemnified by the partners.[3]

(γ) *Negotiable Instruments.*

He cannot, *primâ facie*, nor can any partner bind in respect of negotiable instruments.

However, *primâ facie*, the manager of a mining concern has no authority to bind the partners; nor has any partner authority to bind the other partners; by drawing or making or accepting or endorsing bills of exchange or promissory notes.[4] In such cases the person, who draws or makes or accepts or indorses a bill of exchange or a promissory note, is alone liable. And where a bill is drawn upon a mining concern, and accepted by one of the partners, not in his individual capacity, but by procuration for the concern, the partner so accepting is personally liable.[5] Knowledge or acquiescence may, however, render a partner liable, who would otherwise not be so.[6] But where the deed of association of a mining concern empowered voting by proxy at meetings of the company; and a meeting took place; and a resolution was carried authorising the resident director to accept bills for the company; a managing director, who was not present, but was represented by proxy, was held not to be bound.[7] The state of the law as to negotiable instruments does not seem inconsistent with the proposition, that one of two partners may bind the other by borrowing money for the pressing necessities of the concern; a mere borrowing power being obviously

[1] German Mining Co., 4 De G. M. & G. 19; where the company in question was the same as in Burmester *v.* Norris, *u. s.*

[2] *Ib.*, *per* Knight-Bruce, L.J., Turner, L.J., doubting.

[3] German Mining Co., *u. s.*

[4] Ducarrey *v.* Gill, M. & M. 450; 4 C. & P. 121; Bentley *v.* Bates, 4 Y. & C. Eq. Ex. 191; Thicknesse *v.* Bromilow, 2 Cr. & J. 425; Brown *v.* Byers, 16 M. & W. 252: cf. Bult *v.* Morrell, 12 A. & E. 745; Brown *v.* Kidger, 3 H. & N. 853 (the facts of which are stated *ante*, p. 124); Bateman *v.* Mid-Wales R. Co., L. R. 1 C. P. 499; Peruvian Railways Co. *v.* Thames, &c., Co., 2 Ch. 617. The law as to cost-book companies is the same, see *post*, Chap. XIX., Sect. 3, *c.*

[5] Owen *v.* Van Uster, 10 C. B. 318.

[6] Harrison *v.* Heathorn, 6 M. & G. 81; Thicknesse *v.* Bromilow, *u. s.*

[7] See Brown *v.* Byers, *u. s.*

much less extensive than that of drawing or making or accepting or indorsing bills of exchange or promissory notes. Section 47 of the Comp. Act, 1862, does not of itself confer on companies registered under that Act a power of issuing negotiable instruments.[1]

Comp. Act, 1862.

[1] Peruvian Railways Co. *v.* Thames, &c. Co., 2 Ch. 617.

CHAPTER VII.

POWERS WITH RESPECT TO SALES, PURCHASES, ENFRANCHISEMENTS, PARTITIONS, EXCHANGES, AND INCLOSURES.

PART A.—SALES, PURCHASES, ENFRANCHISEMENTS, PARTITIONS, AND EXCHANGES.

SECT. 1.—TENANT IN FEE.

(*a*) *Tenant in Fee Simple.*

May sell.

EVERY ordinary tenant in fee simple may, of course, sell his mines or quarries. The Court has authority to sanction the sale of the mines or quarries of an infant tenant in fee.[1] Indeed, under the Settled Land Act, 1882,[2] such an infant is in the same position as a tenant for life; and the powers of the Act may be exercised on his behalf by the trustees of the settlement, or, if there are none, then under the direction of the Court.[3] Mines or quarries belonging to a lunatic tenant in fee may be sold or otherwise disposed of under the order of the Court, if such a course be for his benefit.[4] And mines or quarries, to which such a lunatic is entitled in an undivided share, may in like manner and in the like event be sold, partitioned, or exchanged.[5] And land containing such mines or quarries may

Infant may under Court.

Lunatic may under Court.

[1] See 44 & 45 Vict. c. 41, s. 41, by which the provisions of the Settled Estates Act, 1877 (*infra*, Sect. 2, *a*) are made applicable to infants.

[2] 45 & 46 Vict. c. 38.

[3] Ss. 59, 60. The Court had formerly no such authority: see and consider *Re* Smith, 10 Ch. 84, 85. The power of the Court to authorize the sale of particular clumps of timber in a due course of management (Dyer *v.* Dyer, 34 Beav. 504) furnished no analogy upon the present point: see *ante*, p. 43, n. [1].

[4] See Lun. Reg. Act, 1853, 16 & 17 Vict. c. 70, ss. 116 *et seq.*

[5] S. 124.

be sold, partitioned, or exchanged without the mines or quarries, and without any obligation to leave support for the surface.[1] All moneys received on any such sale, partition, or exchange, must be applied for the benefit of the lunatic; and, on his death, are, so far as they are not so applied, considered as real estate.[2] Where two persons of sound mind were tenants in common of mines with a lunatic; and the two sold a part of the mines, and granted a lease of another part, in consideration of a gross sum payable by instalments within a limited time; and one of the two subsequently became a lunatic; and the other sold and granted a lease of other parts in like manner; and the sales and leases were subsequently confirmed by the Court; and the first lunatic died leaving the second lunatic her heir-at-law and sole next of kin; and the second lunatic then died; it was held, (1) that the leases were in the nature of absolute sales; (2) that the confirmation of the sales and leases operated as sales under the order of the Court; and (3) that, as between the real and personal representatives of the second lunatic, the proceeds both of the sales and the leases effected after she became such belonged to her heir-at-law as real estate. But it was held, (4) that the shares of both the lunatics in the proceeds of the sale and lease in which the second lunatic concurred were converted, and belonged to the second lunatic's next of kin.[3]

(β) *Tenant in Tail.*

May sell.

A tenant in tail of mines or quarries may, upon barring the entail,[4] sell them. And, under the Settled Land Act, 1882,[5] he has the same powers as a tenant for life.[6]

[1] *Re* Dicconson, 15 Ch. D. 316.

[2] 16 & 17 Vict. c. 70, ss. 116—121, 124, 135.

[3] *Re* Smith, 10 Ch. 79.

[4] A fine might formerly have been levied of mines: Port *v.* Turton, 2 Wils. 172. As to the power (Scotland) of dispensing with a prohibition upon an heir of entail from granting water easements, see Clerk *v.* C., 10 Sess. Cas. (Ser. 3) 647.

[5] 45 & 46 Vict. c. 38.

[6] S. 58.

SECT. 2.—TENANT FOR LIFE.

a. Settled Estates Act, 1877.[1]

May sell under Court.

Under the Settled Estates Act, 1877, sales of land containing mines or quarries may, under the authority of the Court, be obtained at the instance of a tenant for life.[2] And on any sale of land, which may be authorized, "any earth, coal, stone, or mineral may be excepted, and any rights or privileges may be reserved, and the purchaser may be required to enter into any covenant, or submit to any restrictions, which the Court may deem advisable."[3] And the Court has power under the Act to authorize a sale of mines with an exception of the surface;[4] or with an exception of the surface, a grant of mining easements over the surface, and a reservation of rent in consideration of such grant.[5]

And may separately sell surface and mine.

Application of proceeds.

All money to be received on any sale effected under the authority of the Act may, if the Court shall think fit, be paid to any trustees of whom it shall approve, or otherwise must be paid into Court; and such money must be applied, as the Court may from time to time direct, to some or one of the purposes mentioned in the Act;[6] or, if in Court, it may be invested or applied as capital money arising under the Settled Land Act, 1882.[7] And, until the money can be so applied, it must be invested, and the dividends paid to the parties entitled.[8]

[1] 40 & 41 Vict. c. 18.

[2] S. 16. Leave to sell is obtainable at the instance of "any person entitled to the possession or to the receipt of the rents and profits of any settled estates for a term of years determinable on his death or for an estate for life or any greater estate" (s. 23).

[3] S. 19. For the form of the order, see Set. 1498; *Re* Barrow, Set. 1499.

[4] *Re* Mallin's Estates, 3 Giff. 126; nom. *Re* Law, 7 Jur. N. S. 511; *Re* Gray's Estates, W. N. 1875, p. 106; decisions under the repealed Act 19 & 20 Vict. c. 120, s. 11. See the former case for an illustration of the terms on which such a sale may be sanctioned. For the form of the order, see Set. 1498.

[5] *Re* Milward's Estate, 6 Eq. 248; a decision under the same Act. For the form of the order, see Set. 1498.

[6] S. 34: see also s. 35.

[7] 45 & 46 Vict. c. 38, s. 32: see *post*, pp. 131, 132.

[8] S. 36. For the form of order, see Set. 1498, 1499. For an order authorizing a sale with an exception of minerals, and approving of the investment of part of the proceeds in the purchase of other land, see *Re* Okeover; Wheeler *v.* Tootell, Set. 1501, 1502. A married woman applying to the Court, or consenting, must be examined apart from her husband

b. Settled Land Act, 1882.[1]

Meanings of "mines and minerals" and "mining purposes" in Settled Land Act.

In the Settled Land Act, 1882, the following expressions have or include the following meanings:—"Mines and minerals" mean mines and minerals whether already opened or in work, or not;[2] and include all minerals and substances "in, on, or under" the land, obtainable by underground or by surface working.[3] And "mining purposes" include the sinking and searching for, winning, working, getting, making merchantable, smelting or otherwise converting or working for the purposes of any manufacture, carrying away, and disposing of "mines and minerals in or under" the settled land, or any other land; and the erection of buildings; and the execution of engineering and other works suitable for those purposes.[4]

Tenant for life may sell, enfranchise, exchange, and partition.

A tenant for life may sell the settled land or any part of it, or any easement right or privilege over or in relation to it; and he may effect an enfranchisement, with or without an exception or reservation of the "mines or minerals," or of any rights or powers relative to "mining purposes"; and he may make an exchange, and concur in making a partition;[5] at the best consideration that can reasonably be obtained. On a sale, exchange, or partition, any restriction or reservation with respect to "mines and minerals," or with respect to or for the purpose of the more beneficial working thereof, may be imposed or reserved and made binding, as far as the law permits, on the tenant for life and the settled land or any part of it, or on the other party and any land sold or given in exchange or on partition to him; and an enfranchisement may be made with or without a re-grant of any right, easement, or privilege theretofore

And may separately deal with surface and mine, and create restrictions and easements.

(s. 50); but, if she is out of the jurisdiction, and time is of importance, her examination may be dispensed with (Halliday's Estates, 12 Eq. 199). As to infants, lunatics, bankrupts, and married women, see ss. 49—52.

[1] 45 & 46 Vict. c. 38.

[2] As to open and new mines or quarries, see *ante*, pp. 22 *et seq.*

[3] S. 2. Cf. *ante*, pp. 4 *et seq.* The expression "mines or minerals" is occasionally used in the Act: but this, of course, is equivalent to "mines and minerals."

[4] S. 2. As Mr. Clerke points out, the word "on," which is used in the definition of "mines and minerals," is absent from the definition of "mining purposes;" but, nevertheless, having regard to the probably extensive meaning of the words "within and under" (as to which see *ante*, p. 13), the expression "mining purposes" probably includes a reference to surface workings: see Clerke on the Act, 30.

[5] S. 3.

held or enjoyed with the land enfranchised.[1] And any sale, exchange, or partition may be made either of land with or without an exception or reservation of all or any of the "mines and minerals" therein; or of any "mines and minerals;" and in any such case with or without a grant or reservation of powers of working, way-leaves or rights of way, rights of water and drainage, and other powers, easements, rights, and privileges for or connected with "mining purposes," in relation to the settled land, or any part of it, or any other land; and an exchange or partition may be made subject to and in consideration of the reservation of an undivided share in "mines or minerals."[2] And a tenant for life has corresponding powers of executing deeds,[3] and of entering into preliminary contracts.[4]

Application of proceeds—capital money.

"Capital money" arising under the Act must in general be invested or applied in some or one of the modes mentioned in the Act; which include the following:—(1) In payment for any improvement authorized by the Act. (2) In the purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of purchase; subject or not to any exception or reservation of or in respect of "mines or minerals" therein, or rights or powers relative to the working of "mines or minerals" therein, or in other land. (3) In the purchase, either in fee simple, or for a term of sixty years or more, of "mines and minerals" convenient to be held or worked with the settled land; or of any easement, right, or privilege convenient to be held with the settled land for "mining" or other "purposes."[5] And, in order to its being so invested

[1] S. 4.

[2] S. 17. Mr. Clerke states (see p. 65) that, under this provision, a tenant for life, if unimpeachable of waste, may, by a course of dealing similar to that mentioned in the case of trustees (*post*, p. 133), leave no estate whatever for his successor in title. But this does not appear to be so. It has been held, that a tenant for life without impeachment of waste, with power to sell, is not entitled, if he sells, to the produce of the timber on the lands: see Doran *v.* Wiltshire, 3 Swanst. 699, 701. Moreover, a tenant for life is, under this Act, in the position of a trustee: see s. 53. He would, therefore, be under precisely the same disability as an ordinary trustee (as to whom see *post*, p. 133) to enter upon the course of dealing in question, if and so far as it would prejudice his successor. As regards easements, s. 17 is intended to enlarge the rights of the mine owner, whereas the provision in s. 4, as to restrictions and reservations is intended to limit his rights: see Clerke, 39, 40.

[3] S. 20.

[4] S. 31.

[5] S. 21.

or applied, it must be paid either to the trustees of the settlement or into Court, at the option of the tenant for life; and must be invested or applied by the trustees or under the direction of the Court accordingly. Capital money, while uninvested or unapplied, and the investments thereof, are deemed land, and devolve according to the estates and trusts prescribed by the settlement.[1] Improvements with capital money authorized by the Act are the making or execution on or in connexion with and for the benefit of settled land the works and operations therein mentioned; which include the following:—(1) Jetties, piers, and landing places on rivers, lakes, the sea, or tidal waters, for facilitating the transport of minerals and of things required for "mining purposes." (2) Brick-making, tile-making, and other works in connexion with the authorized objects. (3) Trial pits for mines and other preliminary works necessary or proper in connexion with the development of mines. (4) The reconstruction, enlargement, or improvement of any of the authorized works.[2] The tenant for life and his successors may, without impeachment of waste, execute the authorized improvements and repair them, and do make and use all acts, works, and conveniences proper for those purposes, and get and work firestone, limestone, clay, sand, and other substances, and make tramways and other ways, and burn and make bricks, tiles, and other things.[3] Where, under a settlement, money is in the hands of trustees, and is liable to be invested in land, the trustees may, at the option of the tenant for life, invest or apply it as capital money arising under the Act.[4]

Improvements with capital money.

Land acquired by purchase, or in exchange, or on partition, must be made subject to the settlement by conveyance and otherwise as directed by the Act; and the directions in question extend and apply, as far as may be, to "mines and minerals," and to easements rights and privileges over and in relation to land.[5] In exercising the powers of the Act a tenant for life is a trustee for all the parties interested.[6] But the Court may, where it is expedient, appoint trustees for the purposes of the

Other provisions.

[1] S. 22.
[2] S. 25: see also ss. 26, 27, 28.
[3] S. 29.
[4] S. 33.
[5] S. 24.
[6] S. 53.

Act;[1] whose receipts are effectual discharges.[2] A tenant for life, when intending to make a sale, exchange, or partition, must give notice to the trustees of the settlement, and (if he is known to him) to their solicitor; and at the date of the notice the number of the trustees must not be less than two.[3]

SECT. 3.—TRUSTEES.

a. Sale—Generally.

May not *primâ facie*, sell; or separately sell surface and mine.

Of course trustees have no power, *primâ facie*, of their own motion, to sell lands containing mines or quarries. And where trustees of a settlement, under which a tenant for life without impeachment of waste is in possession, have a mere power to sell the lands, without more, they have no right, of their own motion, to sell them with an exception of the mines.[4] It is obvious that, if trustees had such a right, it might be in the power of a tenant for life, without impeachment of waste, to leave no estate whatever for his successor in title. The trustees might exercise their right, and might with the proceeds of sale, purchase land which itself contained mines, and which the tenant for life could not be prevented from working. And such sales might be repeated indefinitely.[5] However, in all proper cases recourse may be had to the powers given by the Settled Estates Act, 1877,[6] and the Settled Land Act, 1882.[7]

b. Sale—Confirmation of Sales Act.[8]

May under Act separately deal with surface and mine.

And by the Conf. of Sales Act, sales, exchanges, partitions, or enfranchisements, then already in exercise of a trust or power not forbidding the exception, made of land, with an exception of the minerals, or of minerals with an

[1] Ss. 38, 39.

[2] S. 40: see also ss. 41—44.

[3] S. 45. As to procedure, see ss. 46 *et seq.*, and the Settled Land Act Rules, 1882. Other specified limited owners have the powers of a tenant for life: s. 58. As to infants, married women, and lunatics, see ss. 59—62. As to express powers, see *infra*, Sect. 3, *d*.

[4] Buckley *v.* Howell, 29 Beav. 546. Cf. Plymouth *v.* Archer, 1 B. C. C. 159, 160.

[5] See Buckley *v.* Howell, *u. s.*

[6] *Ante*, p. 129.

[7] *Ante*, p. 130.

[8] 25 & 26 Vict. c. 108.

exception of the residue of the land, and in either case with or without incidental rights or powers, were confirmed.[1] And every "trustee and other person," then or thereafter to become authorized to dispose of land by way of sale, exchange, partition, or enfranchisement, was, unless forbidden by the instrument creating the trust or power, empowered, on obtaining the previous sanction of the Court, to make such disposition, with an exception of any minerals, and with or without incidental rights and powers; or to dispose of the minerals, with or without such rights or powers, separately from the residue of the land; and, in either case, without prejudice to any future exercise of the authority with respect either to the excepted minerals, or the undisposed-of land. And it was provided, that the sanction of the Court once obtained should extend to the enabling any disposition to be made from time to time, without the necessity of any further or other application to the Court.[2] The Court will, on petition under the Act, make an order authorizing the sale of land with an exception of the mines, or of the mines with an exception of the surface, in general terms, and without reference to any particular sale.[3] A petition by trustees, who have a power of sale exercisable with the consent of the tenant for life, for leave to sell the lands and minerals separately, need not, if served on the tenant for life, be served on the remainderman.[4] But, upon a petition by trustees, who have a power of sale, for leave to sell the surface and mines separately, the *cestuis que trustent* must either be copetitioners, or must appear and consent.[5]

Practice under Act.

c. Purchase.

May not in general purchase.

Trustees, who hold money for the purpose of an investment in land, are not, as a general rule, empowered to purchase land containing mines or quarries. It would seem, however, that trustees cannot be prevented from purchasing land containing mines or quarries, opened or unopened, if such an investment would

[1] S. 1.

[2] S. 2.

[3] Willway's Trust, 32 L. J. Ch. 226; Wynn's Estates, 16 Eq. 237.

[4] Pryse's Estates, 10 Eq. 531; Powell's Will, 23 W. R. 151; Nagle's Trusts, 6 Ch. D. 104: see also Wynn's Estates, *u. s.*

[5] Brown's Trusts, 32 L. J. Ch. 275; Palmer's Will, 13 Eq. 408. For forms of orders under the Act, see *Re* Cawdor; *Re* Trevor-Roper; *Re* Bowes' Estate Act; *Re* Willway's Trusts; *Re* Brown's Trusts; Set. 1258.

be plainly beneficial for all the parties interested.[1] And, assuming that they act without any desire to favour a tenant for life to the prejudice of a remainderman, or a remainderman to the prejudice of a tenant for life; the facts, that a tenant for life may work open mines,[2] or, if dispunishable for waste, unopened mines;[3] and that a tenant for life, punishable for waste, cannot work unopened mines;[4] are, it would seem, immaterial.[5] Where a testator directed trustees to invest trust moneys in land adjoining to, or convenient to be held with, other land devised by him in strict settlement, the Court sanctioned an investment in mines partly under and partly beside such other land.[6]

d. Sale and Purchase—Express Powers.

Frequently desirable to give express powers.

It will frequently be desirable to supplement the provisions of the Settled Estates Act, 1877,[7] and the Settled Land Act, 1882,[8] by creating express powers to sell mines or quarries, and to except them or the surface from a sale of the land. And mines and quarries being the subject-matter of an exception, and not of a reservation,[9] they would not, it has been said, be construed as coming within the word "reservations" in a power.[10] Nor would they, it has been said, be construed as coming within the words "rent and reservations," where there were, in fact, reservations besides rent.[11] And it has been said to be doubtful, whether they would be construed as coming within those words, where there appeared to be, in fact, no reservation, except rent.[12] And, if such be the intention, a settlement should contain an express power to purchase mines or quarries. Where a settlor desires to create an express power to sell or to purchase mines

[1] See Buckley *v.* Howell, 29 Beav. 552, 553. As to open and new mines or quarries, see *ante*, p. 22 *et seq.* As to laying out in the purchase of mines the proceeds of a sale under the Settled Land Act, 1882, see *ante*, p. 131.

[2] *Ante*, p. 46.

[3] *Ante*, p. 55.

[4] *Ante*, p. 51.

[5] See Buckley *v.* Howell, *u. s.*

[6] Bellot *v.* Littler, 22 W. R. 836.

[7] *Ante*, p. 129.

[8] *Ante*, pp. 130 *et seq.*

[9] See *ante*, p. 11.

[10] Doe *v.* Lock, 2 A. & E. 705.

[11] Doe *v.* Lock, *u. s.*

[12] *Ib.* For the form of such a power, see Dav. 3, pp. 1018, 1019; 4, pp. 81, 82, n. A power to except mines on a partition or exchange is frequently useful. For a form, see Dav. 4, p. 428.

or quarries, he should, it would seem, make the trustees of the settlement the donees of the power.[1] In creating such a power a settlor should, of course, take care to authorize the donees to grant, or reserve, or acquire; as incident to a sale, or to a sale with an exception, or to a purchase; such easements and liberties, by way of instroke,[2] outstroke,[3] or otherwise, to be exercisable in, upon, over, under, through, or in respect of, the adjoining lands; or the adjoining lands and the lands excepted or assured; or any other lands; as the circumstances of the case may render practicable and desirable.[4] And it will in most cases be prudent to limit the powers of the donees by providing, that they shall not sell or purchase, except with the consent in writing of the tenant for life, if of full age. Where a settlement contains a power to sell mines or quarries, it should also contain express provisions as to the mode of dealing with the proceeds of sale. It may, otherwise, be doubtful, especially if the settlement comprises open mines or quarries,[5] or gives a tenant for life power to work new mines or quarries,[6] whether the intention is that the proceeds shall be treated as capital or as income. In most cases, the fairest course for all the beneficiaries will be to provide a similar destination for the proceeds to that provided for the proceeds of sales under the Settled Land Act, 1882.[7]

Application of proceeds.

Sect. 4.—Mortgagee.

Mortgagee.

The expression "other person," mentioned in the Conf. of Sales Act,[8] has been held to include a mortgagee.[9] It is not necessary for a mortgagee, who presents a petition under the Act, to serve it upon subsequent incumbrancers.[10] And an order may be made, notwithstanding the opposition of a subsequent incumbrancer, or of the mortgagor.[11]

[1] See Vivian *v.* Jegon, L. R. 3 H. L. 290.

[2] See *post*, Chap. XI., Sect. 3, *c.*

[3] See *post*, Chap. XI., Sect. 4 (*a*).

[4] See generally, *post*, Chap. X., *c.* For the form of such an authority, see Dav. 3, p. 1019.

[5] See *ante*, pp. 22 *et seq.*, 47.

[6] See *ante*, pp. 22 *et seq.*, 51 *et seq.*

[7] *Ante*, pp. 131, 132. As to powers of working and management, see *ante*, p. 66.

[8] See *ante*, p. 134.

[9] Beaumont's Mortgage Trusts, 12 Eq. 86; Wilkinson's Mortgaged Estates, 13 Eq. 634.

[10] Beaumont's Mortgage Trusts, *u. s.*

[11] Wilkinson's Mortgaged Estates, *u. s.*

SECT. 5.—CO-OWNERS AND PARTNERS.

a. Transfer of Share.

Co-owner may transfer.

Partner in working may transfer.

Any co-owner of a mine or quarry may transfer his share without the consent of the other or others.[1] Any partner at will in the working of a mine or quarry, who is a mere co-owner of the land itself, may transfer his share both in the land and in the working without the consent of the other or others.[2] His right to transfer his share in the land cannot be less than his right to do so would have been if he were not a partner in the working. And his right to transfer his share in the working is like the right of any other partner at will to transfer his share.[3] Such a transfer, however, operates as a dissolution of the partnership:[4] and if any subsequent working is carried on between the old partners and the transferee, it is by virtue of a fresh partnership arrangement. Any partner for a term in the working of a mine or quarry, who is a mere co-owner of the land, has a similar right of transfer.[5] Such a transfer does not necessarily operate as a dissolution; but the old partners may treat it as a dissolution or not at pleasure.[6] Any ordinary

Ordinary partner may transfer.

[1] Crawshay *v.* Maule, 1 Swanst. 505, 518, 519, 523; Bentley *v.* Bates, 4 Y. & C. Eq. Exch. 189: see Steward *v.* Blakeway, 6 Eq. 479; 4 Ch. 603.

[2] See Crawshay *v.* Maule, *u. s.*, 517, 518, 519, 523; Bentley *v.* Bates, *u. s.*, 189. It will be observed, that, in Crawshay *v.* Maule (see Roberts *v.* Eberhardt, Kay, 155), and apparently also in Bentley *v.* Bates, the partnership was at will.

[3] See Lindley, 698.

[4] See Lindley, 698: see Crawshay *v.* Maule, *u. s.*, 525; Bentley *v.* Bates, *u. s.*, 189. In Fereday *v.* Wightwick, 1 R. & My. 49, (the report in Taml. 261, does not contain the words), it was said, "The shares," in a mining concern, "are assignable, and the death or bankruptcy of the holder of shares does not operate as a dissolution;" and a similar statement was made in *Ex parte* Broadbent, 1 M. & A. 638. But these propositions cannot, except as respects cost-book mines (as to which see *post*, Chap. XIX., Sect. 4, *a* (α), *c* (α) (β)), be sustained. See Jefferys *v.* Smith, 3 Russ. 167, 168; Tatam *v.* Williams, 3 Ha. 355.

[5] See *Ex parte* Broadbent, 1 M. & A. 638.

[6] See Lindley, p. 698. See Perens *v.* Johnson, 3 Sm. & G. 424. It will be observed, that in Bentley *v.* Bates, *u. s.*, where the L. C. B. (p. 189), says, "Why pray for a dissolution in a case where you may dissolve the partnership itself by selling your own share?" it does not appear, that the partnership was anything more than at will.

partner, either at will or for a term, in a mine or quarry, may transfer his share without the consent of the other or others. The effect of such a transfer is the same as the effect of a transfer by a person who is a partner in the working, but a mere co-owner of the land.[1]

b. Partition.

Co-owner may in general partition.

Any co-owner of a mine or quarry may have a partition of the whole mine or quarry;[2] unless, from the impossibility or inconvenience of having a partition, it would be more proper to direct a sale.[3]

And partner in working.

And any partner in the working of a mine or quarry, who is a mere co-owner of the land itself, has a similar right;[4] either before or upon a dissolution.[5]

But not ordinary partner.

But no ordinary partner in a mine or quarry is entitled, against the will of his co-partners, to have the mine or quarry partitioned.[6]

c. Sale of Entirety—Partition Acts.[7]

Co-owner may have sale under Acts.

Independently of the Partition Acts, a co-owner of a mine or quarry is not entitled, as of right, to have the whole mine or quarry sold.[8] Nor is a partner in the working of a mine or quarry, who is a mere co-owner of the land itself, so entitled; either previously to, or upon a dissolution.[9] However, under the Partition Act, 1868,[10] if it appears to the Court that a sale of the property and a distribution of the proceeds would be more beneficial than a partition, the Court may, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others, direct a sale accordingly.[11] And, if the

[1] *Ante*, p. 137.

[2] Crawshay *v.* Maule, 1 Swanst. 518. For a decree for a commission to set out the boundaries of two collieries, and the commissioners to look into both the collieries and see how the one intermixed with the other, and to set down temporary boundaries; and the order on further consideration, confirming the certificate and directing the collieries to be held and enjoyed accordingly; see Collingwood *v.* Jenison, Set. 1032.

[3] See Wild *v.* Milne, 26 Beav. 504.

[4] His right in this respect cannot be less than if he was not a partner.

[5] See Wild *v.* Milne, *u. s.*

[6] Wild *v.* Milne, *u. s.*

[7] 31 & 32 Vict. c. 40; 39 & 40 Vict. c. 17.

[8] Crawshay *v.* Maule, *u. s.*, 505, 518 519, 523; Steward *v.* Blakeway, 4 Ch. 609, 610.

[9] Steward *v.* Blakeway, *u. s.*

[10] 31 & 32 Vict. c. 40.

[11] S. 3.

party or parties interested to the extent of one moiety or upwards in the property request a sale instead of a partition, the Court is bound, unless it sees good reason to the contrary, to direct a sale.[1] And, if any party interested requests a sale instead of a division, the Court may, unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale, direct a sale.[2] Where a sale of land is directed under the Act, the Court will not in general reserve the minerals.[3]

d. Sale of Entirety—Ordinary Partnership.

Ordinary partner may have sale without regard to Acts.

Any partner, is, in general, entitled, in an action seeking for dissolution and accounts, and without regard to the Partition Acts, to have the whole concern sold.[4] The other partners cannot, for example, in the absence of contract, insist upon taking his share at a valuation. They would have no such right in an ordinary trading concern; and a mining concern for this purpose stands upon the same footing.[5] But where there is a contract, the other partners may in general, it would seem, insist upon taking the share of one of the partners at a valuation; even although the partnership has been dissolved by the bankruptcy of that partner.[6] Where a sale is decreed, the Court will, pending the execution of the decree, appoint a receiver and manager.[7] However, where one partner is an infant, and a proposal is made

[1] S. 4. As to seeing good reason to the contrary, see Porter *v.* Lopes, 7 Ch. D. 358: see p. 363.

[2] S. 5.

[3] See Lawe *v.* Stoney, W. N. 1876, p. 141.

[4] Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Crawshay *v.* Maule, 1 Swanst. 505, 518, 519, 523; Roberts *v.* Eberhardt, Kay, 155, 160; Lees *v.* Jones, 3 Jur. N. S. 954; Wild *v.* Milne, 26 Beav. 504; Rowlands *v.* Evans; Williams *v.* Rowlands, 30 Beav. 302; Burdon *v.* Barkus, 4 De G. F. & J. 49, 50; Steward *v.* Blakeway, 4 Ch. 609, 610. See Tatam *v.* Williams, 3 Ha. 355, 356.

[5] See Hart *v.* Clarke, 6 De G. M. & G. 249, 250, 251 (affd. Clarke *v.* Hart, 6 H. L. C. 633): see *ante*, p. 57, n. (2), and other cases there cited. See also Burdon *v.* Barkus, *u. s.*; varying, upon this point, S. C., 3 Giff. 431, 432.

[6] See Whitmore *v.* Mason, 2 J. & H. 204, 209, 215, 216.

[7] See Crawshay *v.* Maule, *u. s.*, 507, 526, 529; Lees *v.* Jones, *u. s.*; Roberts *v.* Eberhardt, *u. s.*, 160; Wild *v.* Milne, *u. s.*, 506; Rowlands *v.* Evans, *u. s.*, 310, 311, 312. For the form of the order, see Clegg *v.* Fishwick, Set. 417. In Hart *v.* Clarke (*u. s.*, 254, 255), a receiver and manager was appointed, a dissolution only being decreed, and the question of a sale

by the co-partner to buy the share of the infant, and it appears that it would be for the benefit of the infant that such proposal should be accepted, its acceptance will be sanctioned by the Court, and a sale of the whole mine dispensed with.[1]

Time of sale.

A sale, to take place immediately after judgment, cannot be required as a matter of right. "The Court, if it directs a sale, will so direct it, that the property may be sold in the manner most beneficial for all parties interested. . . . ." "The state of the market varies so much, that a sale, which might be beneficial at one moment, and prejudicial at another, cannot be ordered without inquiry."[2] And an inquiry will in most cases be directed, whether it will be for the benefit of all persons concerned in the works that the same should be sold, and in what manner, as going works; or that they should be carried on for the purpose merely of winding up the concern.[3] And if, in an action seeking for accounts and consequential relief, it is doubtful, whether, after debiting the plaintiff with the sums which he ought to have contributed towards the working, a balance will be found due to him, although a dissolution may be adjudged and accounts ordered to be taken and a receiver and manager appointed, the question of a sale will usually be reserved until the accounts have been taken.[4] On the other hand, where a partnership has been dissolved, and the circumstances of the case require it, an order for a sale may be obtained on interlocutory application before judgment.[5] Indeed, such an order has been obtained, even before dissolution, to prevent a total loss.[6]

Mode of sale.

A sale by auction will usually be directed. And in such a case some indifferent person well acquainted with mining property will be appointed to conduct the sale, and liberty to bid will be given to all the partners.[7] Sometimes it is impossible to

being reserved until the accounts were taken.

[1] Crawshay *v.* Maule, 1 Swanst. 530.

[2] *Ib.* 506, 529, *per* Lord Eldon.

[3] See the form of the inquiry directed in Crawshay *v.* Maule, *u. s.*, p. 529: see also Clegg *v.* Fishwick, Set. 1200; Lees *v.* Jones, 3 Jur. N. S. 955; Wild *v.* Milne, 26 Beav. 506.

[4] See Hart *v.* Clarke, 6 De G. M. & G. 232, 254, 255: affirmed Clarke *v.* Hart, 6 H. L. C. 633.

[5] Crawshay *v.* Maule, *u. s.*, 495, 506, 523.

[6] See Heath *v.* Fisher, 38 L. J. Ch. 14.

[7] Rowlands *v.* Evans, Williams *v.* Rowlands, 30 Beav. 302, 310: see Lees *v.*

carry out the sale by public auction. The mine or quarry may, for example, be held on lease, and the lease may contain a covenant not to assign without license. In such a case the sale will be directed to be carried out by private contract.[1]

Impossibility of sale.

Where no sale, either by public auction or private contract, can be effected; as where the mine or quarry is leasehold, and there is a covenant not to assign without license, and the lessor refuses to accept the proposed vendee as his tenant; the partnership may, of course, be nevertheless dissolved; but the parties will have imposed upon them the position of co-owners of the land,[2] and become subject to the doctrines applicable to co-ownership.[3] Where a decree has been obtained for a dissolution and a sale, the Court will sometimes, at the instance of a small minority of the partners, and against the desire of the others, sanction an advantageous, although expensive and important, alteration in the working, if it can be shown, that it is impossible to effect the sale; but not otherwise.[4]

SECT. 6.—COMPANIES.

Companies with compulsory powers may purchase.

A company purchasing lands under the compulsory powers of the Lands Clauses Consolidation Act, 1845,[5] have power to purchase the mines and minerals thereunder.[6] And this power is not confined to cases where the mines and minerals and the rest of the land from the surface down to the centre belong to the same vendor, and the purchase of the minerals is merely part of the purchase of the whole land. It extends to cases where the mines and minerals and the rest of the land are in different owners. If the law were otherwise, the construction of their works might become impossible.[7] And the company in question

Jones, 3 Jur. N. S. 955. In Wild *v.* Milne, 26 Beav. 504, one of the partners was given the conduct of the sale, and liberty was given to the others to bid.

[1] Lees *v.* Jones, 3 Jur. N. S. 955: see however, Perens *v.* Johnson, 3 Sm. & G. 427.

[2] Lees *v.* Jones, *u. s.*; see Perens *v.* Johnson *u. s.*, 426, 427.

[3] Lees *v.* Jones, *u. s.*: see *ante*, pp. 110 *et seq.*

[4] Lees *v.* Jones, *u. s.*, 954.

[5] 8 & 9 Vict. c. 18, ss. 16 *et seq.*

[6] Errington *v.* Met. R. Co., 19 Ch. D. 559, 568, 569, 573, 578.

[7] *Ib.*, 569, 578.

are none the less empowered to purchase mines and minerals, because the provisions of the Rail. Cl. Cons. Act, 1845,[1] or of the Wat. Cl. Act,[2] may apply to them.[3] A railway company purchasing under the Rail. Cl. Cons. Act, 1845, are not "entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines excepting as aforesaid shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby."[4] And the Wat. Cl. Act contains provisions substantially identical.[5] And under these provisions such a company may equally purchase minerals worked by surface as those worked by underground workings.[6] And these provisions do not deprive such a company of the power which under the Lands Cl. Act they would have of purchasing the mines and minerals as a separate tenement.[7] Nor do the words "expressly purchased" confine their power to purchases by agreement only. They are empowered to purchase the mines and minerals as a separate tenement by compulsion.[8] And the mere fact, that they may have already purchased the surface as a separate tenement, does not exhaust their power. They may at any time subsequently, within the period limited for the exercise of their powers, purchase the underlying mines and minerals. For there can be no distinction in principle between a power to make successive vertical purchases of the surface and the underlying strata and a power to make successive horizontal purchases of the surface only.[9] And the power,

Notwithstanding that they

[1] 8 & 9 Vict. c. 20, s. 77.

[2] 10 & 11 Vict. c. 17, ss. 12, 18.

[3] Birmingham Canal Co. *v.* Cartwright, 11 Ch. D. 421; Hooper *v.* Bourne, 3 Q. B. D. 258: 5 App. Cas. 1, 23, 24; Errington *v.* Met. R. Co., 19 Ch. D. 559, 569, 572; Mid. R. Co. *v.* Haunchwood, &c., Co., 20 *ib.* 556.

[4] 8 & 9 Vict. c. 20, s. 77.

[5] 10 & 11 Vict. c. 17, ss. 12, 18.

[6] See Mid. R. Co. *v.* Haunchwood, &c., Co., *u. s.*, 552, 556, 558; *ante*, p. 9.

[7] Errington *v.* Met. R. Co., 19 Ch. D. 559, 569.

[8] *Ib.*, 559, 569, 573, 574, 578, 579; notwithstanding the dicta to the contrary of Lords Cranworth and Westbury in G. W. R. Co. *v.* Bennett, L. R. 2 H. L. 40, 41; and of James, L.J., in G. W. R. Co. *v.* Smith, 2 Ch. D 244.

[9] Errington *v.* Met. R. Co., *u. s.*, 559, 570, 574, 575.

which such a company possess,[1] of preventing the working of a mine upon the terms of compensating the owner, is an additional and independent power, and does not restrict their power of purchase.[2] For it may well be more convenient for them to purchase the mines when they are raising their capital;[3] and they may be able to obtain them at a smaller price than if they waited until the commencement of the mining operations.[4] Moreover, it may well be, that they may require to use the space occupied by the minerals. Those minerals may, for example, be insufficient to afford adequate support to their works; and their removal and the substitution of artificial props may be necessary for that purpose. Or the space in question may be necessary for some such purpose as the construction of culverts. But, against the will of the landowner, neither object can be accomplished without acquiring the property in the minerals.[5] And whenever the necessity or propriety of a purchase is contested, the opinion of the officer of the company, if *bonâ fide*, is the only evidence required. And a mere general statement, that the minerals in question are required, is a sufficient expression of opinion. And the onus of proving, that they are wanted for some collateral purpose, or that the alleged purpose is manifestly absurd, or that there is in other respects want of *bona fides*, rests upon the landowner.[6] It is not obligatory on a company purchasing surface land under the provisions of the Rail. Cl. Act or the Wat. Cl. Act to purchase the underlying minerals.[7]

may also prevent working.

Evidence as to necessity or propriety of purchase.

Not bound to purchase.

Where lands, which a railway company are authorized by their special Act to take, are conveyed to them; and the conveyance contains an express grant of the mines and minerals thereunder; and the lands are kept by the company, not *bonâ fide* for the purposes of the undertaking, but merely for the purpose of working the minerals; that fact is in itself evidence, that the lands are "superfluous" within the meaning of section

"Superfluous" lands.

[1] See s. 78 of Rail. Cl. Act, cited *ante*, p. 6 n.

[2] Errington *v.* Met. R. Co., 19 Ch. D. 569, 570, 571, 575, 576: see also *post*, Chap. XV., Part D. (β) (γ).

[3] Errington *v.* Met. R. Co., *u. s.*, 570, 571.

[4] *Ib.*, 578.

[5] *Ib.*, 572, 574, 575, 576.

[6] *Ib.*, 569, 571, 576, 577.

[7] *Re* Huddersfield and Jacomb, 17 Eq. 476, 489. See the sections of the Acts, *ante*, pp. 5 n. *et seq.*

127 of the Lands Cl. Cons. Act, 1845.[1] Where, however, the lands are kept under the belief, whether rightly or wrongly, that they will be used at a future time for the purposes of the undertaking, the mere fact that the company in the meantime choose to utilise them by working the minerals thereunder furnishes no such evidence.[2] And if it afterwards turns out, that although the surface is required for the purposes of the undertaking, those purposes could be answered without preserving to the surface the mineral support, there does not appear to be any authority for saying, either that the company are bound to sell the mines apart from the surface, or that in default of such sale the mines vest in the adjacent owners.[3] Indeed it has been laid down, that where in such a case it afterwards turns out, that the surface is superfluous, and vests in the adjoining owners, the mines and minerals will not so vest, but will remain the property of the company.[4] But this was doubted in the same case when in the House of Lords.[5]

[1] See Hooper *v.* Bourne, 5 App. Cas. 22, *per* Lord Blackburn.

[2] Hooper *v.* Bourne, 3 Q. B. D. 288, *per* Cotton, L.J.; 5 App. Cas. 22, *per* Lord Blackburn.

[3] Hooper *v.* Bourne, 5 App. Cas. p. 12, *per* Lord Cairns; p. 24, *per* Lord Blackburn.

[4] Hooper *v.* Bourne, 3 Q. B. D. 258: see pp. 278, *per* Bramwell, L.J., 284, *per* Brett, L.J.

[5] See 5 App. Cas. 23, 24, *per* Lord Blackburn. Where mines, brickworks, and marl pits belonging to charity trustees are compulsorily purchased by a railway company, and the costs of an inquiry before arbitrators are taxed and settled as between the parties by one of the taxing masters under s. 1 of 32 & 33 Vict. c. 18, the Court has no jurisdiction over the master's taxation on a motion to review: see Sandbach Trustees *v.* North Staff. R. Co., 3 Q. B. D. 1.

SECT. 7.—CORPORATIONS.

a. Crown Lands.[1]

The Commissioners of Woods, Forests, and Land Revenues[2] may sell,[3] exchange,[4] or purchase[5] any mines or quarries; or sell any part of them for the purpose of raising money for the redemption of the land tax charged on any other part.[6] The moneys arising from sales or exchanges, if not immediately wanted, must be invested in the Three per Cents., and the dividends applied in the same manner as the income of the Land Revenues is applied.[7]

Commissioners of Woods may sell, exchange, or purchase.

Application of proceeds.

b. Duchy of Cornwall Lands.

By the Duchy of Cornwall Man. Act, 1863,[8] the Prince of Wales, as Duke of Cornwall, may sell or enfranchise[9] or (under the machinery of the Inclosure Acts[10]) exchange[11] any mines or quarries; or may purchase any mines, minerals,[12] or quarries, or rights of mining.[13] All deeds for carrying those purposes into effect must be enrolled in the Duchy office within six months.[14]

Prince of Wales may sell, enfranchise, exchange or purchase.

[1] The general law only as to Crown lands is here stated. As to mines of coal and iron, and quarries of stone, within the Hundred of St. Briavels, in Gloucestershire, see *post*, Chap. XX.: and as to mines of lead in parts of Derbyshire, see *post*, Chap. XXI.

[2] At common law the demesne lands of the Crown were freely disposable by the reigning sovereign (see 1 Bl. 286); who might, therefore, at pleasure, work, or sell, or lease, any mines or quarries beneath or within them, and take the profits. But since the Act 1 Anne, st. 1, c. 7, the sovereign has been disabled from selling any part of the Crown lands, or leasing any part except conditionally (see s. 5). And under various subsequent Acts the land revenues of the Crown have been placed under the management of, and are now managed by, the Commissioners of Woods, Forests, and Land Revenues (see 10 Geo. 4, c. 50, ss. 1, 8).

[3] 10 Geo. 4, c. 50, s. 34.

[4] Ss. 42, 43, 44.

[5] S. 52.

[6] S. 59.

[7] Ss. 108, 109, 110, 113.

[8] 26 & 27 Vict. c. 49. By the original constitution of the Duchy the possessions thereof were so settled that they could not be separated or alienated: see the preamble of the Act.

[9] Ss. 3, 37.

[10] See *post*, p. 158.

[11] S. 41.

[12] "Minerals" in the Act include all minerals, whether metallic or not, stone and substrata of every description: see s. 37.

[13] S. 7. As to the powers, which were exerciseable during the minority of the Prince, see 7 & 8 Vict. c. 65.

[14] 26 & 27 Vict. c. 49, ss. 30 *et seq.*

Application of proceeds.

The moneys arising from sales or exchanges, if not immediately wanted (whether for the purpose of purchasing mines, minerals, quarries, or rights of mining, or for any other purpose), must be invested in the Three per Cents., and the dividends applied in the same manner as the income of the Duchy lands is applied.[1]

Non-age or non-existence.

In case the Duke of Cornwall for the time being should be under age, the powers given by the Act may be exercised in his name and on his behalf by the Sovereign for the time being.[2] And when the Duchy is vested in the Crown, the powers of the Act may be exercised by the Sovereign for the time being.[3]

c. Church Lands.

Eccl. corp. may sell, exchange or partition.

Every Ecclesiastical Corporation (with certain exceptions[4]) may, in general, with the approval of the Ecclesiastical Commissioners for England, and (if such corporation be the incumbent of a benefice) with the consent of the patron,[5] and upon giving three months' notice in writing to the bishop,[6] sell, or convey in exchange, or by way of partition, or otherwise dispose of, mines or quarries belonging to such corporation for such considerations and purposes as the Commissioners may deem reasonable and proper; and give and receive money by way of equality of exchange or partition.[7] And they may, with the like approval and consent, enter into and vary preliminary contracts.[8]

Land Tax—Red. Act.

However, by the Land Tax Red. Act, 42 Geo. 3, c. 116, it is provided, that no mines or minerals or seams or veins of coal, metals, or other like profits belonging to any manors or lands, which may be sold by an Ecclesiastical Corporation for the purpose of redeeming any land tax, whether opened or unopened,[9] shall pass by the conveyance of such manors or lands, either by express or general words; but (together with all incidental easements) shall be as effectually excepted and reserved as if expressly excepted and reserved.[10] This Act repealed, as from the

[1] Ss. 8, 13, 14; 31 & 32 Vict. c. 35.

[2] 26 & 27 Vict. c. 49, s. 38.

[3] S. 39. S. 18 provides for the settlement by arbitration of disputes respecting boundaries or the title to any property or to any right of way, or water, or other right.

[4] See 5 & 6 Vict. c. 108, s. 1.

[5] S. 20; 21 & 22 Vict. c. 57, s. 1.

[6] 21 & 22 Vict. c. 57, s. 1.

[7] Ss. 1, 3.

[8] S. 4.

[9] As to open and new mines or quarries, see *ante*, pp. 22 *et seq.*

[10] S. 80.

24th of June, 1802, the Act 39 Geo. 3, c. 21, which contained similar provisions.[1] Accordingly, where a prebendary, for the purpose of redeeming the land tax on part of the estate of his prebend, sold in 1799 under the powers of the repealed Act a part of the estate, with an exception of the pipe and potter's clay thereunder (except within 20 perches from the houses and inclosures forming part of the land sold), and with certain working powers incident to the exception; and an Act[2] was subsequently passed, which confirmed invalid sales under the repealed Act; it was held, that the confirming Act did not so ratify the sale as to give validity to the exception out of the exception.[3] The Acts in question do not, however, affect binding contracts for the sale of lands, which had been entered into before they were passed.[4]

Application of proceeds.

All moneys (other than moneys which shall become due and payable by way of perpetual annual chief or other rent or rent-charge[5]) received in respect of any sale, and all moneys received in respect of any exchange or partition, must be paid to the Commissioners, or such moneys or any part thereof may, with the approval of the Commissioners, be permitted to remain outstanding on mortgage, and must, on payment off, be paid to the Commissioners; and the moneys so paid must be laid out by the Commissioners in the purchase of other lands convenient to be held by the corporation in question; and the purchased lands, and the lands received on any exchange or partition, must be conveyed so as to vest in the corporation; and, until the purchase, the moneys must be invested, and the dividends applied in the same manner as the rents of the purchased lands would be applied in case the purchase were actually made.[6]

d. Charity Lands.

Charity lands.

No assurance for charitable uses made after the passing of the Act 24 & 25 Vict. c. 9, is void under the Mortmain Act, 9 Geo. 2, c. 36, by reason of its containing a grant or reservation of any mines or minerals, or easement.[7]

[1] S. 12.

[2] 57 Geo. 3, c. 100, s. 25.

[3] Whidborne *v.* Eccl. Commrs., 7 Ch. D. 375.

[4] Wilson *v.* Grey, 3 Eq. 117.

[5] 28 & 29 Vict. c. 57.

[6] 21 & 22 Vict. c. 57, s. 2.

[7] 24 & 25 Vict. c. 9, s. 1. This applies to voluntary assurances as well as to assurances for value.

c. Parish Lands—Lands of Local Authorities.

Parish lands.

Trustees or commissioners of turnpike roads are empowered to contract for the purchase of any land for the purpose of digging materials for the repair or use of the roads; and at any time afterwards to sell the land so purchased.[1] Where land has been allotted to or otherwise acquired by a parish, and the materials therein have been exhausted, it may be sold under an order of the Local Government Board; and any right to mines or minerals claimed by the lord of the manor or any other person may be reserved, or the sale may be made subject thereto; and the proceeds of sale are applicable for the benefit of the parish.[2]

Lands of local authorities.

The Lands Cl. Cons. Act, 1845, is incorporated with the Public Health Act, 1875.[3] And, although s. 334 of the latter Act provides that "nothing in this Act shall be construed to extend to mines of different descriptions so as to interfere with or obstruct the efficient working of the same, nor to the smelting of ores and minerals, nor to the calcining, puddling, and rolling of iron and other metals, nor to the conversion of pig iron into wrought iron, so as to obstruct or interfere with any of such processes respectively," a local authority is not thereby precluded from purchasing mines; the obvious application of the section being to nuisances only.[4]

PART B.—ENFRANCHISEMENTS, INCLOSURES, PARTITIONS, AND EXCHANGES.

SECT. 1.—ENFRANCHISEMENT ACTS.

a. Voluntary Commutation and Enfranchisement.

Lords and tenants may agree on commutation or

Lords and tenants of manors may, with the consent of the Land Commissioners, agree on terms for the commutation[5] or

[1] 3 Geo. 4, c. 126, s. 100.

[2] 39 & 40 Vict. c. 62, ss. 1, 2, 5, 6: cf. 5 & 6 Will. 4, c. 50, s. 48.

[3] See s. 176.

[4] See *Re* Dudley, 8 Q. B. D. 86, 96, 97, *per* Brett, Cotton, and Lindley, L.JJ. Denman, J. (see p. 90), considered it to refer to open mines (as to which, see *ante*, pp. 22 *et seq.*) as opposed to possible future mines.

[5] 4 & 5 Vict. c. 35, s. 52.

enfranchisement[1] of the manorial rights. The commutation may be made to extend to mines, minerals, and quarries, if expressly agreed upon; but not otherwise.[2] The agreement for commutation or enfranchisement may be made, wholly or in part, in consideration (amongst other things) of any right to mines or minerals; whether in or under lands parcel of the same manor as the lands to be commuted or enfranchised, or not.[3] But, if not in or under lands parcel of the same manor, the right to such mines or minerals must, in the opinion of the Commissioners, be convenient to be held with the manor.[4] And, in either case, the right must be subject to the same or the like uses or trusts as the lands to be commuted or enfranchised are subject to.[5] And the person empowered to obtain the commutation or enfranchisement is accordingly entitled to convey rights to mines and minerals to the person commuting or enfranchising.[6] The Commissioners may hear and determine disputes as to fines or other manorial payments or incidents, but no such determination can directly or indirectly affect any right to mines or minerals.[7] enfranchisement.

Upon commutation or enfranchisement tenants may grant to the lord, in aid of the reservation of his right in mines and minerals, such rights of entry and way, and other easements, in or upon or through their respective lands, as may be requisite for mining purposes. In cases of commutation, it is sufficient to state in the agreement the fact of such grant, and the consideration (if any) to be payable therefor. But in cases of enfranchisement, the easements must be granted in the deed.[8] Tenants may grant easements to lords.

b. Compulsory Enfranchisement.

Lords or tenants may compel the enfranchisement of manorial rights.[9] In such a case the party requiring the enfranchisement Lord or tenants may compel enfranchisements.

[1] S. 56.

[2] S. 82. Lord Romilly, in Kerr *v.* Pawson (25 Beav. 406, 407), in observing upon this section, appears to have confused commutation with enfranchisement: see Dav. 2, p. 387, n.

[3] 6 & 7 Vict. c. 23, ss. 1, 3; 7 & 8 Vict. c. 55, s. 5.

[4] 7 & 8 Vict. c. 55, s. 5.

[5] *Ib.*

[6] 6 & 7 Vict. c. 23, s. 3; 7 & 8 Vict. c. 55, s. 5.

[7] 4 & 5 Vict. c. 35, s. 39.

[8] S. 84. This applies to the Duchy of Cornwall lands: see 11 & 12 Vict. c. 83, s. 5. A power to trustees to except mines upon an enfranchisement is frequently useful. For the form of such a power, see Dav. 4, p. 428.

[9] 15 & 16 Vict. c. 51, s. 1; 21 & 22 Vict. c. 94, s. 6.

must give notice in writing of his desire to the other party. And, unless the parties can agree about the same, the consideration to be paid to the lord must be ascertained by valuation;[1] the consideration (in the absence of agreement to the contrary) being, where the enfranchisement is effected at the instance of the tenant, a gross sum of money, and where it is effected at the instance of the lord, an annual rent-charge.[2] After the consideration has been determined on, the Commissioners may frame and confirm an award of enfranchisement, which has the same effect as a deed.[3] No compulsory enfranchisement can affect the rights of any lord or tenant in mines, minerals, or quarries under the lands enfranchised, or any other lands; or any rights of entry, way, and search, and other easements of any lord or tenant; or any powers which, but for such enfranchisement, might have been exercised for the purpose of working the mines or quarries or carrying away the minerals therefrom; unless with the express consent in writing of such lord or tenant.[4] But, without prejudice to these rights and powers, the owners of enfranchisements may disturb and remove the soil for making roads or drains, or erecting buildings or obtaining water.[5]

But not so as to affect mineral rights without consent.

Sect. 2.—Inclosures.

a. Generally.

Under Stat. of Merton lord may approve against common of pasture.

Independently of modern legislation,[6] the following is the position of lords of manors and commoners with respect to the inclosure of commons. Under the right of approving given by the Statute of Merton,[7] the lord of a manor may, as against common of pasture, sell or grant leases of or otherwise appropriate the waste or common of the manor.[8] And he may do so equally

[1] 21 & 22 Vict. c. 94, s. 8.

[2] 15 & 16 Vict. c. 51, s. 7.

[3] 21 & 22 Vict. c. 94, s. 10.

[4] 15 & 16 Vict. c. 51, s. 48. In Kerr *v.* Pawson, 25 Beav. 407, Lord Romilly appears to have inadvertently stated that there were no means by which the rights of the lord in mines, &c., could be affected.

[5] 21 & 22 Vict. c. 94, s. 14.

[6] See *infra*, *b*. For customary and prescriptive rights in respect of wastes or commons, see *ante*, pp. 91—97, 102—104.

[7] 20 Hen. 3, c. 4.

[8] Lascelles *v.* Onslow, 2 Q. B. D. 449 *et seq.*; Robinson *v.* Dulcep Singh, 11 Ch. D. 831: see also Wil-

against the freeholders,[1] as against the copyholders,[2] of the manor. And it is immaterial that the persons entitled to common of pasture are also entitled to some other right of common, such as a right to dig sand; if they complain only of the interruption of the right of common of pasture.[3] He must, however, leave sufficient common for the commoners;[4] and the onus is upon him to show that he has done so.[5] But the fact, that for such a period as ten years there has been a sufficiency of common, will frequently be *primâ facie* evidence that an actual sufficiency has been left.[6] However, the lord of a manor cannot, *primâ facie*, as against common of turbary or estovers, appropriate the mines or quarries, or the earth or gravel, in the waste; such a thing as turf not being annually renewable.[7] And his disability in this respect is irrespective of whether sufficient common for the commoners would be thereby left or not.[8] Such a right would not be authorized by the Statute of Merton, as that only entitles a lord to approve against common of pasture.[9] The disability in question does not, however, exist, unless the land proposed to be approved produces, or is capable of producing, turf or fuel.[10] And in other cases, there may be a special custom in a manor, authorizing a lord to so appropriate.[11] But even, in such a case, the lord must, in exercising his right, leave sufficient common for the commoners;[12] and leave

But must leave sufficient common.

Cannot, *primâ facie*, approve against other commons.

But may by custom.

liams on Commons, 103 *et seq.*; Elton on Commons, 175 *et seq.*

[1] Which is the more usual case.

[2] See Williams, 123, citing Shakespear *v.* Peppin, 6 T. R. 741; Elton, 209 *et seq.*

[3] Fawcett *v.* Strickland, Com. Rep. 577; Shakespear *v.* Peppin, *u. s.*

[4] Lascelles *v.* Onslow, 2 Q. B. D. 449 *et seq.*; Robinson *v.* Duleep Singh, 11 Ch. D. 831.

[5] See Arlett *v.* Ellis, 7 B. & C. 377; Betts *v.* Thompson, 6 Ch. 732; Hall *v.* Byron, 4 Ch. D. 680; Lascelles *v.* Onslow, *u. s.*, 450; Bell *v.* Love, 10 Q. B. D. 559. The onus is upon the commoner, where the question arises as to the right of the lord to dig for minerals; *ante*, p. 76.

[6] Lascelles *v.* Onslow, *u. s.*

[7] Duberley *v.* Page, 2 T. R. 391; Grant *v.* Gunner, 1 Taunt. 435; Arlett *v.* Ellis, *u. s.*, 374; Lascelles *v.* Onslow, *u. s.*, 433, 450.

[8] Lascelles *v.* Onslow, *u. s.*

[9] Arlett *v.* Ellis, *u. s.*, 375; A.-G. *v.* Hanmer, 27 L. J. Ch. 841; Lascelles *v.* Onslow, *u. s.*, 451; Williams on Commons, 137.

[10] Peardon *v.* Underhill, 16 Q. B. 120.

[11] Arlett *v.* Ellis, *u. s.*, 370, 371; Lascelles *v.* Onslow, *u. s.*, 451.

[12] Arlett *v.* Ellis, *u. s.*, 370, 371; Lascelles *v.* Onslow, *u. s.*, 451. Cf. Badger *v.* Ford, 3 B. & Al. 155.

it in such a state as to make the right of common conveniently exercisable.[1]

Clarkson *v.* Woodhouse.

In an action of trespass against a commoner it was shown to be a custom for the owners of ancient messuages in a manor to have common of turbary in the waste for necessary fuel; and for the owner of the waste to assign to the owners of the messuages reasonable parts of the waste to be held in severalty for digging turves for necessary fuel in respect of such messuages; and for the owners of such messuages to get turves in such reasonable parts and in no other parts of the waste; and, when and so often as the turves were completely removed from such reasonable parts, for the owner of the waste to inclose them. This was held to be a good custom.[2] Where a lord in 1751 demised a brick kiln then standing on a waste, with liberty to inclose a piece of land not exceeding half an acre, and to dig earth for the use of the kiln; and the lease was renewed from time to time; and meanwhile leases of other parts of the waste were granted for similar purposes; and during the currency of the lease of 1751 presentments were made by the homage of encroachments on the waste by strangers; but no objection was made to the granting of the leases; and the commoners bought bricks at the kilns; it was held, that there was evidence sufficient to establish, that the lord had by custom the right to approve, so that he left sufficiency of turbary and estovers.[3] And such evidence may be available to an equal degree against the freeholders as against the copyholders of a manor; although the freeholders may have obtained from the lord an express grant of common of turbary and estovers.[4]

Lascelles *v.* Onslow.

Copyholds in waste.

Sand pits or gravel pits in a waste may be copyhold tenements distinct from the waste, and demisable by custom.[5]

Notice of intention to inclose.

Any person intending to inclose a common, otherwise than under the provisions to be presently mentioned,[6] must give three months' notice, by publication in the local papers, to all persons claiming any right in such common.[7]

[1] Arlett *v.* Ellis, 7 B. & C. 377.

[2] Clarkson *v.* Woodhouse, 5 T. R. 412 (n). Its validity appears doubtful: see *ante*, p. 103.

[3] Lascelles *v.* Onslow, 2 Q. B. D. 133. 451, 452.

[4] *Ib.* 452, 453.

[5] Doe *v.* Cook, 5 Esp. 221.

[6] See *infra*, *b*.

[7] 39 & 40 Vict. c. 56, s. 31.

b. Modern Inclosure Acts—Inclosure and Regulation of Commons.[1]

(*a*) *Generally—Adjustment of Rights—Local Inquiry.*

Generally.

Where land has been inclosed, by encroachment or otherwise, from land subject to be inclosed, for more than twenty years, and is not declared allottable, inclosure proceedings cannot prejudice the rights of the Crown or others to such land or the minerals thereunder.[2]

Adjustment of rights.

A provisional order for the regulation of a common may provide for the "adjustment of rights" in respect of it.[3] And in "adjustment of rights" the following, amongst other things, are comprised:—As respects rights of common of turbary in, or taking gravel stone from, or otherwise interfering with the soil of, the common, being waste land of a manor, the determination of the persons to exercise, and the mode, places, and times of exercise; and, on compensation being made to any person aggrieved, the restriction, modification, or abolition of such rights. As respects any common, whether waste land of a manor or not, the determination of the rights and obligations of the lord, severalty owners, or other persons entitled to the soil; and, on compensation being made to any person aggrieved, the restriction, modification, or abolition of such rights. And as respects any common, whether waste land of a manor or not, the determination of any rights and settlement of any disputes relating to boundaries, rights in the soil, or in the produce of the soil, or otherwise.[4]

Application for provisional order.

With respect to applications for a provisional order, it is, amongst other things, necessary, that evidence should be furnished as to the expediency of the application considered in relation to private interests. And such evidence must comprise statements as to the mines, minerals, or valuable strata (if any) under the common in question; the questions of boundary (if any) concerning such mines, minerals, or strata; and, where the in-

[1] As to the Metrop. Commons, see 29 & 30 Vict. c. 122.

[2] 10 & 11 Vict. c. 111, s. 3.

[3] 39 & 40 Vict. c. 56, ss. 2, 3.

[4] S. 4.

terest of any lord of the manor in mineral rights may be affected, the allotment (if any) or compensation agreed on or proposed to be made to him.[1] The Land Commissioners, if satisfied that a *primâ facie* case has been made out, must order a local inquiry; which is held accordingly, and the result reported.[2]

Local inquiry.

(β) *Draft Provisional Order—Consents—Confirmation.*

Draft provisional order.

The Commissioners, if satisfied that it is expedient to proceed further in the matter, must then frame a draft provisional order, and, if the application is for the regulation of a common, must therein specify whether the provisions for the "adjustment of rights" are to be put in force. With respect to private interests, where the interest of any lord of the manor in mineral rights may be affected, there must be inserted in the draft provisional order a statement of the allotment (if any) or other compensation to be allotted or made to him.[3] And there may be inserted, as one of the conditions of the inclosure, any special agreement or matter concerning or affecting the lands to be inclosed.[4] And this provision authorizes a condition, that the right to mines and minerals shall be severed from the soil; and that the tenement thus created shall remain in the lord, while the soil is allotted to others.[5] There may also be inserted, as one of the conditions of the inclosure, the reservation to the lord of rights of way and other easements over the inclosed lands for working and carrying away mines or minerals, although not under the inclosed lands, and whether within or not within the manor; and also for working and carrying mines or minerals to be reserved to the lord under the inclosed land.[6] Indeed, where the mines or minerals are reserved to the lord, there must be inserted a statement, whether or not a right to enter for the purpose of working is also to be reserved, and whether or not any compensation is to be made for surface

Statements and conditions to be inserted.

[1] S. 10.

[2] Ss. 10, 11.

[3] S. 12. Cf. the repealed s. 27 of 8 & 9 Vict. c. 118; and the decision thereon of Musgrave *v.* Incl. Comms., L. R. 9 Q. B. 162.

[4] 11 & 12 Vict. c. 99, s. 1.

[5] Musgrave *v.* Forster, L. R. 6 Q. B. 590.

[6] 14 & 15 Vict. c. 53, s. 9.

damage.[1] And, where there is any mineral property or other rights in relation thereto belonging to persons other than the lord which may be affected, there must be inserted a statement, whether or not a right to enter the land when inclosed for the purpose of working is to be reserved to such other person, and whether or not any compensation is to be made for surface damage; and there must also be inserted such other provisions and reservations as may appear proper.[2] For the purpose of providing a means of compensation for surface damage, the persons interested may agree as to the mode in which compensation shall be made; and such agreement, if allowed by the Commissioners, must be stated to the valuer acting under the Act as part of his instructions, and embodied by him in his report and award.[3]

Consents.

The draft provisional order is then submitted for the consideration of the parties interested. Before it can be certified to be expedient, persons representing two-thirds in value of the interests in the common must consent thereto.[4] If, therefore, in any case an interest includes brick earth, the brick earth must be valued. And if the brick earth forms part of the surface, or lies so close to it as in effect to form part of it, it is immaterial that "minerals" may have been expressly excepted from the operation of the inclosure; such brick earth not being a mineral.[5] And where the common is land within a manor, to the soil of which the lord is entitled in right of the manor, unless there is more than one person interested, the expediency cannot be certified, unless the person interested consents; and where there is more than one person interested, the expediency cannot be certified, in case such persons or the majority of them dissent.[6]

Confirmation.

When the necessary consents have been obtained, the Commissioners must certify, that it is expedient that the order

[1] See 22 & 23 Vict. c. 43, s. 1. This provision is not affected by 39 & 40 Vict. c. 56, s. 12. As to the meaning of "surface damage," see Allaway *v.* Wagstaff, 4 H. & N. 681, mentioned *post*, Chap. XV., Part C, Sect. 2, *c* (δ), note.

[2] 22 & 23 Vict. c. 43, s. 1; 39 & 40 Vict. c. 56, s. 12.

[3] 22 & 23 Vict. c. 43, s. 2: see *infra*, p. 157.

[4] 39 & 40 Vict. c. 56, s. 12.

[5] See Church *v.* Incl. Comms., 11 C. B. N. S. 664; a decision under the repealed s. 27 of 8 & 9 Vict. c. 118. See *ante*, pp. 19, 20.

[6] 39 & 40 Vict. c. 56, s. 12.

should be confirmed by Parliament; and the certificate is then presented to Parliament, and may be confirmed.[1]

(γ) *Valuer—Allotments—Report—Award.*

Appointment of valuer.

As soon as conveniently after the passing of any confirming Act, a valuer is appointed to divide set out and allot, or to regulate, the common;[2] and claims are then heard and determined.[3]

His duties and powers—allotments.

The valuer must allot to the surveyor of highways such part of the land proposed to be inclosed as by the instructions given to the valuer shall have been directed to be appropriated for supplying stone, gravel, or other materials for the repairs of roads and ways; or (in case no such instructions shall have been given) such part (if any) as the valuer shall think fit.[4] And, after making certain other specified allotments;[5] and after making provision for payment of the expenses by sale of land in case the expenses shall be so directed to be paid;[6] he must allot to the lord of the manor so much of the land as he shall consider equal to such part of the residue as shall be proportioned to his right or interest, according to the directions of the provisional order, in lieu of his right in the soil, and exclusive of any other allotments which may be made to him in respect of any other rights.[7] And in case the provisional order declares, that his right has been estimated exclusively of his right in the mines or substrata, the valuer must, on the request of the lord, reserve to the lord such rights and easements for searching for working and carrying away such mines or substrata as shall not have been included in such estimate, subject to such provisions for compensation for surface damage as the valuer, with the approval of the Commissioners, may think reasonable.[8] And the residue of the land is allotted to the persons interested, in

[1] 39 & 40 Vict. c. 56, s. 12.

[2] 8 & 9 Vict. c. 118, s. 33; 39 & 40 Vict. c. 56, ss. 13, 32.

[3] 8 & 9 Vict. c. 118, ss. 34, 35, 46, 47, 48, 55, 56, 57, 60.

[4] 8 & 9 Vict. c. 118, ss. 34, 72.

[5] Ss. 73, 74, 75.

[6] In Wakefield *v.* Buccleuch (4 Eq. 613); Buccleuch *v.* Wakefield (L. R. 4 H. L. 377); it was made a question whether or not Commissioners under an Inclosure Act had power to sell, freed from the lord's right to mines, lands sold for the purpose of defraying the expenses of the Act.

[7] S. 76.

[8] *Ib.* As to surface damage, see *ante*, p. 155, n. [1].

shares proportionate to the value of their interests as claimed and allowed.[1] And in case the provisional order declares, as one of the conditions of the inclosure, the reservation to the lord of easements over the inclosed land for mining purposes,[2] the valuer must reserve to the lord such liberty to construct railways, waggon ways, and roads, and such rights of way and other easements over the lands to be inclosed for working the mines in question, as the valuer, with the approval of the Commissioners, may think reasonable, and as shall not be inconsistent with the provisional order; subject to such provision for compensation for surface damage as shall be thought reasonable.[3] And in every case in which part of the land is converted into and used as a regulated pasture, and the residue divided and allotted in severalty, the valuer may, having regard to the rights of the lord, as ascertained and declared by the provisional order, and with the consent of the lord and a majority in value of the other persons interested, direct that the rights of the lord in the mines and substrata under the regulated pasture shall be reserved to the lord, and that the mines and substrata under the residue shall become the property of the owners of the respective allotments, and that the allotments be adjusted accordingly.[4] And, subject to such rights and interests, the property in the soil of regulated pastures vests in the owners of the rights of pasture therein in proportion to their shares as tenants in common.[5]

Report.

After the completion of the allotment or regulation, a report is drawn up: the parties interested are, if necessary, heard; and, subject thereto, the report is approved by the Commissioners.[6]

Award.

The valuer must then, under the direction of the Commissioners, draw up an award, and sign it; describing therein the allotments and regulation; and declaring whether all or any and which of the mines and substrata shall or shall not have been included in the estimate of the right of the lord in the soil in respect of which any allotment shall have been made to him;

[1] S. 77.

[2] See *ante*, p. 154.

[3] 14 & 15 Vict. c. 53, s. 9. As to surface damage, see *ante*, p. 155, n. [1].

[4] 8 & 9 Vict. c. 118, s. 97.

[5] S. 116.

[6] Ss. 102, 103; 39 & 40 Vict. c. 56, s. 13.

and such award must be confirmed by the Commissioners, and is then binding and conclusive.[1]

c. Modern Inclosure Acts—Partitions and Exchanges.

Partitions and exchanges.

Partitions and exchanges may be made by the valuer acting under the Inclosure Acts ;[2] and the power to effect them extends to lands not subject to be inclosed.[3] And where an exchange is made of lands not subject to be inclosed, or of lands as to which no inclosure proceedings are pending, the Commissioners may except or reserve out of such exchange the property or right to the mines or minerals under the land given by both or either of the parties, together with auxiliary rights and easements, and (whether the mines or minerals shall or shall not be reserved) such rights of way and other easements as the parties may have agreed on.[4]

[1] 8 & 9 Vict. c. 118, ss. 104, 105 ; 39 & 40 Vict. c. 56, s. 13. In Rowbotham *v.* Wilson (8 H. L. Cas. 361, 362, 363, 366), the power of Commissioners under an Inclosure Act to separate by their award the mines from the surface was disputed, but upheld.

[2] 8 & 9 Vict. c. 118, ss. 90, 91, 92 ; 20 & 21 Vict. c. 31 ; see *ante*, p. 156.

[3] 8 & 9 Vict. c. 118, s. 147 ; 11 & 12 Vict. c. 99, s. 13.

[4] 10 & 11 Vict. c. 111, s. 4.

CHAPTER VIII.

POWERS WITH RESPECT TO LEASES AND LICENSES.

Sect. 1.—TENANT IN FEE.

(a) *Tenant in Fee Simple.*

May lease at pleasure.

Every ordinary tenant in fee simple may, of course, grant what leases he pleases of his mines or quarries, whether they are opened or unopened.[1]

Infant may under 1 Will. 4, c. 65, or under Settled Estates or Settled Land Act.

Where an infant is entitled to lands in fee, and it appears to the Court to be for his benefit, that a lease thereof should be made for the working of mines, the infant or his guardian in his name may, by the direction of the Court, under the Act 1 Will. 4, c. 65, s. 17, make such lease for such term or terms of years, and subject to such rents and covenants, as the Court shall direct.[2] And the lease may be made of new as well as of open mines.[3] And the authority of the Court to give its sanction to such a lease is not confined to cases where the infant is an ordinary tenant in fee simple. It extends to cases where the infant is entitled in possession subject to an executory devise over, if the devisee consents;[4] or is entitled in remainder, subject to a tenancy by the curtesy, if the tenant consents;[5] or is entitled merely as a co-owner with other persons.[6] The lands of an infant tenant in fee may also be demised under the powers of the Settled Estates Act, 1877,[7] as extended by section 41 of the Conv. Act,

[1] As to open and new mines or quarries, see *ante*, pp. 22 *et seq.*

[2] The Act also applies to the case of an infant being entitled to any leasehold land for an absolute interest; see s. 17.

[3] There is no restriction in the authority given to the Court. As to open and new mines or quarries, see *ante*, pp. 22 *et seq.*

[4] *Re* Clark, 1 Ch. 292: cf. *Re* Letchford, 2 Ch. D. 719; and see 44 & 45 Vict. c. 41, s. 41.

[5] Spencer's Trusts, 37 L. J. Ch. 18.

[6] See Bentley *v.* Landor, Set. 743, where the form of the order is given.

[7] 40 & 41 Vict. c. 18.

1881.[1] And where one-sixth of an estate containing coals was settled, and the other five-sixths were vested in infants in fee, a lease was approved under the joint authority of the Act 1 Will. 4, c. 65, s. 17, and the Settled Estates Act, 1877.[2] And, under the Settled Land Act, 1882,[3] an infant tenant in fee is in the same position as a tenant for life; and the powers of the Act may be exercised on his behalf by the trustees of the settlement, or, if there are none, then under the direction of the Court.[4]

Lunatic may, under Lun. Reg. Act, both as to open

Where a lunatic is entitled to land in fee, and it appears to be for his benefit that any mine or quarry already opened[5] therein should be worked, the committee may, in the name and on behalf of the lunatic, under the order of the Lord Chancellor, make such leases thereof, either with or without any land convenient to be held therewith, and with or without the surface, to such person, for such term or terms, and subject to such rents and conditions, as the Lord Chancellor shall order.[6]

and new mines or quarries.

And, where a lunatic is entitled to land in fee, and it appears either to be necessary for the maintenance of the lunatic and the members of his immediate family for whom provision is directed to be made, or to be expedient in a due course of management, that any unopened[5] mine or quarry in, upon, or under the land, should be opened and worked, leases thereof may in like manner be granted.[7] The Court, in sanctioning a lease, will not allow a premium or fine to be taken.[8] And what

[1] 44 & 45 Vict. c. 41. "Rent." under the Act, includes yearly or other rent, toll, duty, royalty, or other reservation by the acre, the ton, or otherwise. And a "mining lease," under the Act, is a lease for mining purposes; that is, the searching for, winning, working, getting, making merchantable, carrying away, or disposing of, mines and minerals, or purposes connected therewith, and includes a grant or license for mining purposes. S. 2, sub-ss. 9, 11. Cf. the definitions in the Settled Land Act, *infra*, Sect. 2, *c*.

[2] See *Re* Edwards, Set. 1492. The Court would not, under the Act 1 Will. 4, c. 65, s. 17, have authorized the grant of a lease of mines, in which an infant was only entitled in remainder; however beneficial such a lease might have been: Wood *v.* Patteson, 10 Beav. 541. Such a lease may, however, be granted under the Settled Estates Act, 1877: see *infra*, Sect. 2, *b*.

[3] 45 & 46 Vict. c. 38.

[4] Ss. 59, 60.

[5] As to open and new mines or quarries, see *ante*, pp. 22 *et seq.*

[6] The Lun. Reg. Act, 1853, 16 & 17 Vict. c. 70, s. 130: see the corresponding Irish Act, 34 & 35 Vict. c. 22, ss. 79, 81.

[7] 16 & 17 Vict. c. 70, s. 131: see the corresponding Irish Act, 34 & 35 Vict. c. 22, ss. 80, 81.

[8] See *Re* Smith, 10 Ch. 86.

purports to have been a lease under the order of the Court may, if anything in the nature of a premium or fine has been taken, be treated as a sale;[1] and the whole of the consideration may, on the death of the lunatic, belong to his heir-at-law as real estate accordingly.[2] The produce of new[3] mines or quarries, when necessary for the maintenance of the lunatic and his family, must be so applied; and, in such case the surplus, and in every other case, all the produce, must be carried to a separate account, and applied as mentioned in the Act; and, upon the lunatic's death, the moneys remaining on the credit of such account are, as between his real and personal representatives, considered as real estate.[4] The committee may, under the order of the Lord Chancellor, accept surrenders of existing leases and make new leases;[5] and all fines and moneys received upon renewals must be applied for the benefit of the lunatic; and, on his death, are, so far as they are not so applied, considered as real estate.[6]

And may accept surrenders and renew leases.

(β) *Tenant in Tail.*

A tenant in tail of mines or quarries has, under the Settled Land Act, 1882,[7] the same powers of leasing them as a tenant for life.[8] The provisions of 1 Will. 4, c. 65, already stated,[9] enabling leases to be granted of mines beneath lands to which an infant is entitled in fee simple, apply where an infant is entitled in tail.[10] An infant tenant in tail may also obtain power to grant leases of mines or quarries under the Settled Estates Act, 1877,[11] or under the Settled Land Act, 1882.[12] The provisions already stated,[13] enabling leases to be granted of mines or quarries beneath or within lands to which a lunatic is entitled in fee simple, apply where a lunatic is entitled in tail.[14]

May lease

[1] Under 16 & 17 Vict. c. 70, ss. 116, 124: see *ante*, p. 128.

[2] *Re* Smith, 10 Ch. 79, cited *ante*, p. 128.

[3] As to open and new mines or quarries, see *ante*, pp. 22 *et seq.*

[4] 16 & 17 Vict. c. 70, s. 132: see the corresp. Irish Act, 34 & 35 Vict. c. 22, s. 82.

[5] 16 & 17 Vict. c. 70, s. 134.

[6] S. 135: see the corresp. Irish Act, 34 & 35 Vict. c. 22, ss. 84, 85.

[7] 45 & 46 Vict. c. 38.

[8] S. 58.

[9] *Ante*, p. 159.

[10] See s. 17.

[11] See ss. 23, 49. See Boyd's Estate, 8 Ir. Rep. Eq. 76 (a decision under the repealed Act, 19 & 20 Vict. c. 120). For the form of the order, see pp. 77, 78.

[12] See ss. 58, 59, 60.

[13] *Ante*, p. 160.

[14] See Lun. Reg. Act, 1853, 16 & 17 Vict. c. 70, ss. 130, 131, 132; 18 & 19

Sect. 2.—TENANT FOR LIFE.

a. Generally.

Independently of legislation may not, *primâ facie*, lease.

Independently of legislation, a tenant for life cannot, *primâ facie*, grant leases of mines or quarries, so as to bind his successor. But if a tenant for life, impeachable of waste, leases new[1] mines, he will not, although the lease be improper, be allowed to restrain the lessee from working; as he cannot be permitted to disaffirm his own lease.[2] And on similar principles, an agreement by a tenant for life, impeachable of waste, to grant a lease of new[1] mines, may, to the extent of his interest, be specifically enforced against him.[3]

b. Settled Estates Act, 1877.[4]

May under Settled Estates Act.

However, under the authority of the Settled Estates Act, 1877, the Court may authorize the grant of mining leases; or leases of wayleaves, waterleaves, or other rights or easements over or affecting any settled estates; for terms of years not exceeding forty years.[5] And any such lease may be for such term of years as the Court may direct, where the Court shall be satisfied, that it is the usual custom of the district and beneficial to the inheritance to grant such lease for a longer term than forty years.[6] And, as the lease may be made whether it involves waste or not,[7] it may be made of unopened as well as of opened[1] mines.[8] But every such lease must be made to take effect in possession at or within one year next after the making thereof.[9] And in every such lease must be reserved the best rent or reservation in the nature of rent, either uniform or not,

But must comply with statutory requirements.

Vict. c. 13, s. 1: see the corresp. Irish Act, 34 & 35 Vict. c. 22, ss. 79, 80, 81, 82.

[1] As to open and new mines, see *ante*, pp. 22 *et seq.*

[2] Wentworth *v.* Turner, 3 Ves. 3.

[3] See Cleaton *v.* Gower, Finch, 164.

[4] 40 & 41 Vict. c. 18.

[5] S. 4. Leave to grant leases is obtainable at the instance of the same persons as in the case of sales (*ante*, p. 129, n. [2]; s. 23).

[6] S. 4. Cf. the corresponding provision of the Settled Land Act, *post*, p. 166.

[7] S. 4.

[8] There is nothing in the Act to prevent the grant of a lease of mines to which an infant is entitled in remainder. The Court had no such power under 1 Will. 4, c. 65: see Wood *v.* Patteson, 10 Beav. 541. See 44 & 45 Vict. c. 41, s. 41.

[9] 40 & 41 Vict. c. 18, s. 4.

that can be reasonably obtained, to be made payable half-yearly or oftener, without taking any fine or other benefit in the nature of a fine. But a peppercorn rent or any smaller rent than the rent to be ultimately made payable may, if the Court shall think fit so to direct, be made payable during all or any part of the first five years of the term of the lease.[1] And every such lease must be by deed; and the lessee must execute a counterpart; and the lease must contain a condition for re-entry on non-payment of the rent for a period of 28 days after it becomes due, or for some less period to be specified in that behalf.[2] And every such lease must contain such other covenants and conditions as the Court shall deem expedient.[3] As an illustration of such other covenants and conditions, the Court, in approving of an agreement for a lease of land, with liberty to dig and get brick-earth, has required the lessee to bind himself not to occasion a nuisance to neighbouring owners, and to indemnify the lessors against proceedings in respect of any nuisance.[4] Parts of settled estates may be leased as well as the whole. And the power to authorize leases may be exercised from time to time.[5] And leases may be surrendered and renewed.[6] And the power to authorize leases extends to preliminary contracts.[7] And the power may be exercised either by approving of particular leases; or, with the consent of all parties, by vesting general leasing powers in trustees.[8] And, where one sixth of an estate containing coals was settled, and the other five sixths were vested in infants in fee, a lease was approved under the joint authority of the Settled Estates Act, 1877, and the Act 1 Will. 4, c. 65, s. 17.[9] As incident to the power to grant a mining lease conferred by the Act, power will be granted to lease so much land as may be necessary for the convenient and

Incidental powers.

[1] *Ib.* It seems doubtful whether the Act authorizes a lease reserving a render in kind: see Dav. 4, p. 415 (n). Cf. the definition of rent in the Settled Land Act, 1882, *post*, p. 164: see also *post*, p. 165.

[2] S. 4.

[3] S. 5. For an order approving of agreements for mining leases, with directions as to their settlement by the judge, and as to the application of the rents, see Bolton Estes., Set. 1491.

[4] S. 26.

[5] S. 6.

[6] S. 7.

[7] S. 8.

[8] Ss. 10—13: see Hutchinson's Trusts, 14 W. R. 473. See Set. 1487, 1489, for the form of a vesting power.

[9] See *Re* Edwards, Set. 1492. As to the latter Act, see *ante*, p. 159. For the form of the order, which will be made, see Set. 1489. 1490.

effective working of the minerals;[1] and power may be granted to grant way-leaves over any part of the settled estates.[2]

Application of rents.

Where the Court authorizes a lease of any "earth, stone, coal, or mineral," one fourth part, or three fourth parts, of the rent or payment reserved, according as the person for the time being entitled to the receipt of the rent is, or is not, by reason of his estate or of any declaration in the settlement in question, entitled to work such earth, stone, coal, or mineral, for his own benefit, must be from time to time set aside;[3] and the moneys so set aside must be paid and applied in the same way[4] as moneys to be received on any sale effected under the authority of the Act.[5] And in every lease sufficient provision must be made to insure such application by the appointment of trustees or otherwise as the Court may deem expedient.[6] Salt obtained by the evaporation of brine-water pumped up from a depth of 150 feet is not "earth, stone, coal, or mineral;" so as to come within these provisions.[7] Moneys set aside, and in the hands of trustees for investment in the purchase of other lands, will pass with the surface, and not with the mines of which the lease had been granted, where the surface and the mines have, under a power of appointment, of which the tenant for life of both was the donee, been separately devised.[8]

c. Settled Land Act, 1882.[9]

Meanings of "rent" and "mining lease" in Settled Land Act.

In the Settled Land Act, 1882, the following expressions have or include the following meanings:—"Rent" includes yearly or other rent, and toll, duty, royalty, or other reservation, by the

[1] Reveley's Estes., 11 W. R. 744.

[2] Wallace's Estes., W. N. 1869, p. 66.

[3] S. 4. Cf. the corresponding provision of the Settled Land Act, *post*, p. 167.

[4] Ss. 34, 35, 36.

[5] See *ante*, p. 129. An order made under the repealed Act, 19 & 20 Vict. c. 120, having been amended under the repealed Act, 27 & 28 Vict. c. 45, by striking out a condition as to settling a lease in chambers, the costs of the application were directed to be paid out of the one-fourth part of the rents set aside: Lovat *v.* Leeds, 11 L. T. N. S. 442.

[6] S. 4. For the form of the order, see Set. 1490.

[7] See Dudley's Settled Estates, 26 S. J. 359, cited in Clerke's Settled Land Act, p. 53.

[8] *Re* Scarth, 10 Ch. D. 499; decided under s. 23 of the repealed Act, 19 & 20 Vict. c. 120.

[9] 45 & 46 Vict. c. 38.

acre or the ton or otherwise; and, in relation to "rent," "payment" includes delivery. And a "mining lease" is a lease for any "mining purposes" or purposes connected therewith, and includes a grant or license for any "mining purposes."[1] The meanings of "mines and minerals" and "mining purposes" have been already stated.[2]

Tenant for life may lease under Act.

A tenant for life may lease the settled land or any part of it, or any easement, right, or privilege of any kind, over or in relation to it, for mining purposes; for any term not exceeding sixty years.[3] And, as the lease may be made, whether it involves waste or not,[3] it may be made of unopened as well as of opened mines.[4] And a mining lease may be made either of land, with or without an exception or reservation of all or any of the "mines and minerals" therein; or of any "mines and minerals;" and in any such case with or without a grant or reservation of powers of working, wayleaves, or rights of way, rights of water and drainage, and other powers, easements, rights, and privileges for or connected with "mining purposes," in relation to the settled land or any part of it, or any other land.[5] But the lease must be by deed, and be made to take effect in possession not later than twelve months after its date; and must reserve the best rent that can reasonably be obtained; and must contain a covenant by the lessee for payment, and a condition of re-entry on non-payment within a time specified not exceeding thirty days; and a counterpart must be executed by the lessee.[6] The rent may be made to be ascertainable by or to vary according to the acreage worked, or the quantity gotten or dealt with, in or from the settled land or any other land, or by or according to any facilities given in that behalf.[7] And a minimum rent may be made payable, with or without an average clause.[8] And a lease may be made partly in consideration of the lessee having executed, or his agreeing to

But must comply with statutory requirements.

Incidental powers.

[1] S. 2. Cf. the definitions in the Conv. Act, 1881, *ante*, p. 160, n. [1].

[2] *Ante*, p. 130.

[3] S. 6.

[4] As to open and new mines, see *ante*, pp. 22 *et seq.*

[5] S. 17.

[6] S. 7.

[7] Mr. Clerke doubts, whether, notwithstanding the definition of "rent" (*ante*, p. 164), the Act, having regard to its provisions as to the application of rents (*post*, p. 167), authorizes a lease reserving a render in kind (see Clerke on the Act, 49). But it is submitted that this doubt is unfounded.

[8] As to an average clause, see *post*, Chap. XI., Sect. 2, *a* (*β*).

execute, on the land leased, an improvement authorized by the Act,[1] for or in connection with "mining purposes."[2] And where it is shown to the Court with respect to the district in question, either that it is the custom for land therein to be leased for "mining purposes" for a longer term or on other conditions than those above mentioned, or in perpetuity; or that it is difficult to make such leases except for a longer term or on other conditions, or except in perpetuity; the Court may authorize generally the tenant for life, and each of his successors in title being or having the powers of a tenant for life, to make from time to time leases of the settled land or parts thereof for any term or in perpetuity at any rents, secured by condition of re-entry or otherwise as in the order expressed, or may authorize him to make any such lease in any particular case.[3] And a tenant for life may accept, with or without consideration, a surrender of any lease, in respect of the whole land leased, or any part of it, with or without an exception of all or any of the "mines and minerals;" or in respect of "mines and minerals," or any of them; and on a surrender in respect of part only of the land or "mines and minerals," the rent may be apportioned. And the tenant for life may make a new or other lease, or new or other leases in lots, of the surrendered land or "mines and minerals" or any part thereof; and such new or other lease may comprise additional land or "mines and minerals," and may reserve any apportioned or other rent.[4] And a tenant for life has corresponding powers of executing deeds,[5] and of entering into preliminary contracts.[6] The powers of the Act may be exercised on behalf of an infant tenant for life by the trustees of the settlement, or, if there are none, then under the direction of the Court.[7]

[1] *Ante*, p. 132.

[2] S. 9. See Clerke, 49, 50.

[3] S. 10. See also s. 12. Cf. the corresponding provision of the Settled Estates Act, *ante*, p. 162. Where, under the Settled Land Act, the Court gives a general authority, the order must not, unless for some special reason, direct any particular lease to be settled or approved by the judge: and where the Court gives a particular authority, the order may either approve a lease already prepared, or may direct that the lease shall contain specified conditions, or such conditions as may be approved at chambers without directing the lease to be settled by the judge: Settled Land Act, Rules, 1882, r. 9.

[4] S. 13.

[5] S. 20.

[6] S. 31.

[7] S. 60. See *Re* Newcastle's Estates, W. N. 1883, p. 99, where the

Application of rents—"capital money."

Whether the "mines or minerals" leased are already opened or in work or not,[1] there must, unless a contrary intention is expressed in the settlement, be from time to time set aside, as capital money arising under the Act, three fourth parts of the rent where the tenant for life is impeachable for waste, and otherwise one fourth part, and the residue of the rent must go as rents and profits.[2] The mode of investing or applying capital money has been already stated.[3]

Other provisions.

The position of a tenant for life as a trustee, and the power of appointing trustees, have been already stated.[4] The provisions requiring the tenant for life to give notice in the case of a sale, exchange, or partition,[5] apply also in the case of a lease.[6]

SECT. 3.—TRUSTEES.

a. Generally.

May not, *primâ facie*, lease.

Trustees, as such, have no power to grant a mining lease on the mere ground that it is beneficial for the parties interested; such a lease operating *pro tanto* as an abstraction of the inhe-

powers of the settlement and the powers of the Act were in conflict. See also *Re* Wells, W. N. 1883, p. 111; a case of a partnership colliery.

[1] As to open and new mines, see *ante*, pp. 22 *et seq.*

[2] S. 11. In all cases, therefore, whether a tenant for life is impeachable for waste or not, some portion of the rent must be set aside; and *Re* Newcastle's Estates, as noted in W. N. 1883, p. 99, is not to be understood as an authority to the contrary. It seems clear, that it was the intention to introduce a provision corresponding with that of the Settled Estates Act, 1877 (*ante*, p. 164); and that the words "tenant for life impeachable for waste" would be construed as having a similar meaning to the words "not entitled to work for his own benefit" in the Settled Estates Act, 1877. If, therefore, a person is tenant for life of land containing open mines, and a lease is granted under the Settled Land Act, one-fourth part only of the rent need be set aside, although the tenant for life is not such "without impeachment of waste." See Wolst. & T., p. 23. Mr. Clerke, however (p. 53), takes a different view. Where rent is set aside, the lessee must, it seems, pay it to the trustees or into Court. The trustees should be parties to the lease, and their portion of the rent made payable to them. See Wolst. & T., p. 23. See, however, Clerke, p. 53.

[3] *Ante*, p. 131.

[4] *Ante*, p. 132.

[5] *Ante*, p. 133.

[6] S. 45. As to procedure, see ss. 46 *et seq.*, and the Settled Land Act, Rules, 1882. Other specified limited owners have the powers of a tenant for life: s. 58. As to married women and lunatics, see ss. 61, 62. As to express powers, notwithstanding these Acts, see *infra*, Sect. 3, *b*.

ritance. And it is immaterial, that they may have been directed to pay the rents of the property in question to a tenant for life. And, independently of statute, they cannot obtain the requisite power from the Court.[1] And a trust to sell mines or quarries does not authorize leases to be granted.[2] However, in all proper cases, recourse may be had to the powers given by the Settled Estates Act, 1877,[3] or the Settled Land Act, 1882.[4] Where two contiguous mining estates belong to trustees upon trust for distinct beneficiaries, and the trustees obtain power to grant mining leases under the Settled Estates Act, an agreement by them to grant one lease of both estates, reserving the rents and royalties as if there were only one estate, and enabling the minerals to be worked by means of a shaft on one of the estates, is *ultra vires*.[5] And whether an agreement by trustees to grant one lease of two estates can, under any circumstances, be *intra vires*, is questionable.[6]

Lease of two estates.

b. Express Powers.

(*a*) *Generally.*

Sometimes desirable to give trustees express powers.

It will sometimes be desirable to supplement the provisions of the Settled Estates Act, 1877,[3] and the Settled Land Act, 1882,[4] by creating an express power to grant leases of mines or quarries. However, a direction in marriage articles, that a settlement shall contain "all usual powers," will probably, if the articles include mines, authorize the insertion of a power to lease them.[7] And, where a settlement of personal property contained a covenant to settle all future acquired property on the same trusts, and subject to the same powers, or as near thereto as the nature and tenure of the property would admit of; and mines, which had never been effectually worked, but of which the prior owner had granted leases, were subsequently acquired; the insertion of a power to grant leases of such mines was held authorized.[8] Where a settlement contains an express power of leasing mines or quarries, the power is frequently, if not gene-

[1] Wood *v.* Patteson, 10 Beav. 541.
[2] See Jervoise *v.* Clarke, 6 Madd. 96.
[3] *Ante*, p. 162.
[4] *Ante*, p. 164.
[5] Tolson *v.* Sheard, 5 Ch. D. 19.
[6] *Ib.*
[7] Hill *v.* Hill, 6 Sim. 145.
[8] Scott *v.* Steward, 27 Beav. 367.

rally, given to the tenant for life, if *sui juris*. And the analogy of the Settled Land Act, 1882,[1] lends, to say the least, considerable countenance to the practice. However, having regard to the fact, that a lease of mineral property is in very few respects different in substance from a sale,[2] it would seem to be the more correct practice to give the power of leasing, as a power of sale is given,[3] to the trustees;[4] arming them, if necessary, with the incidental power to revoke existing, and to appoint new, uses.

(β) *Incidental Provisions*[5]*—Construction of Powers.*

Parcels should be defined in creating power to lease.

A power to lease "land" includes a power to lease all mines and quarries within or under it.[6] However, in general, in creating a power to grant mining leases care should be taken to define accurately the mines in respect of which the power may be exercised. Where an estate, "with the mines, minerals, and quarries" thereunder, was settled; and power was given to the trustees of the settlement to demise "all or any part" of the "said hereditaments, lands, and other premises," so as none of the lessees "be made dispunishable of waste;" and the power contained no specific mention of mines; it was held, that the trustees had no power to grant leases of the unopened, but only of the opened,[7] mines.[8] However, where an estate, "with the mines and minerals," was settled; and power was given to the trustees to demise the "said hereditaments and premises, or any part thereof," and the "coal, minerals, and stone within or under the same, together with or separately therefrom, with the appurtenances;" it was held, that this autho-

[1] *Ante*, p. 165.

[2] See Attersoll *v.* Stevens, 1 Taunt. 201, *per* Lord Mansfield; Jegon *v.* Vivian, L. R. 1 C. P. 34, *per* Erle, C.J.; Eadon *v.* Jeffcock, L. R. 7 Exch. 394, *per* Bramwell, B.; Vivian *v.* Jegon, L. R. 3 H. L. 290; Gowan *v.* Christie, L. R. 2 Sc. & Div. 284, *per* Lord Cairns; Coltness Co. *v.* Black, 6 App. Cas. 335, *per* Lord Blackburn. See also Smith *v.* G. W. R. Co., 3 App. Cas. 178, 179, 180, 185, 186, 191. See also the Scotch case of Weir *v.* Durham, 8 Sess. Cas. (Ser. 3) 725.

[3] *Ante*, p. 136.

[4] See Vivian *v.* Jegon, L. R. 3 H. L. 290, *per* Lord Cairns.

[5] For forms, see Dav. 3, p. 1007 *et seq.*, 1107 *et seq.*, 1212.

[6] See Campbell *v.* Leach, Amb. 747; Clegg *v.* Rowland, 2 Eq. 165, 166.

[7] As to open and new mines, see *ante*, pp. 22 *et seq.*

[8] Clegg *v.* Rowland, 2 Eq. 165, 166. Cf. Campbell *v.* Leach, Amb. 740. Cf. also Thursby *v.* Thursby, 19 Eq. 395, 414. See *ante*, p. 53.

rized a lease of the coal and minerals situated under any part whatever of the premises; and that the power was not, therefore, restricted to mines open at the date of the settlement, but extended also to unopened[1] mines. And a clause in the settlement, providing that lessees should not be "dispunishable for waste," was held repugnant to the other parts of the settlement, and was rejected in construing it.[2] Where an estate contained mines both opened and unopened;[1] and the donee of a leasing power leased both the opened and the unopened mines, but reserved separate rents on each mine; it was held, that, as he had not reserved a gross sum for all the mines, the power, although not well exercised as to the unopened, was well exercised as to the opened, mines.[3]

Liberties.

A mere power to lease lands does not authorize a lease of wayleaves or other liberties.[4] In creating a power to grant liberties care should be taken to define them accurately. Difficulties arising from the neglect of this precaution may, no doubt, sometimes be solved by reference to the liberties usual in the district in question.[5] But, generally, a solution will not be easy. In *Morris* v. *Rhydydefed Co.*,[6] a settlement reserved a power to lease collieries and coal mines, "together with all such powers, authorities, accommodations, liberties, and privileges as shall be necessary, or are usually contained in leases of collieries or mines in the county, place, or neighbourhood where the collieries or mines" are "situate, for seeking, winning, working, drawing, taking, and carrying away" the coals; and provided, that the lessee should not, except in the cases expressly provided for, be made dispunishable for waste by any express words. In a lease granted under the power the lessee was authorized to build all such workmen's cottages, &c., as should be "*bonâ fide* necessary or proper" for carrying out the works; and also to dig and use on any part of the lands stones, brick earth, and other materials for any building authorized to be made. The

[1] As to open and new mines, see *ante*, pp. 22 *et seq.*

[2] Daly *v.* Beckett, 24 Beav. 114.

[3] Campbell *v.* Leach, Amb. 740. The like care should be taken to use accurate language in creating a power to except mines or quarries from a lease of the land which contains them. See Doe *v.* Lock, 2 A. & E. 705.

[4] See Ricketts *v.* Bell, 1 De G. & S. 335.

[5] See Scott *v.* Stewart, 27 Beav. 367, 368.

[6] 3 H. & N. 473, 885.

lessee built several cottages for workmen. It was found by a jury, that the power to build cottages in places convenient to the works of the mine was a necessary and usual power in mining leases. It was held, that the lease was valid.[1]

Time when power exerciseable.

So, difficulties may arise, unless the time when a leasing power may be first exercised is defined. In *Leigh* v. *Balcarres*[2] a difficulty arose as to whether a leasing power under a will could be exercised during the life of the first tenant for life. The testator devised the residue of his real estate to the use of trustees, in trust to pay the rents to A. for life, but impeachable for waste for "digging or getting any part of any coal or cannel opened or to be opened" otherwise than under the power thereinafter given; remainder to the use of B. for life, impeachable for waste in like manner; remainder to the trustees to support contingent remainders; remainder to the use of C. and his sons in tail male; with other remainders over. Then followed a power to "the person or persons (except A.)," who, under the previous limitations, should, for the time being, "be seised of, or entitled to, the actual freehold," or "the annual rents," to grant leases of the mines in possession. It was held, that the trustees had power to grant leases during the life of A.

Duration.

In like manner, difficulties may arise, unless the period, for which the lease may be granted, is defined. No doubt, where a testator settles lands upon A. for life without impeachment of waste, with remainder to his first and other sons in tail male, with remainders over; and he empowers the tenants for life under his will to grant mining leases "for such terms or numbers of years" as to them "shall seem reasonable and proper;" he authorizes a lease for 99 years.[3] And it may be, that in some cases a gift of a power to lease mines simpliciter, without saying for how long, may authorize a lease for 99 years.[4] It is, however, clear, that a gift of a power to lease mines, following a gift of a life estate in real

[1] Cf. Jegon *v.* Vivian, L. R. 1 C. P. 9, 36, 37: reversed on another point 2 *ib.* 422; Vivian *v.* Jegon, *ib.* 3 H. L. 285. For the form of a power with respect to liberties, see Dav. 3, pp. 1007 *et seq.*, 1107 *et seq.*

[2] 6 C. B. 847.

[3] See Taylor *v.* Mostyn, 51 L. J. Ch. 696: affirmed W. N. 1883, p. 87.

[4] See Vivian *v.* Jegon, L. R. 3 H. L. 293, 294, *per* Lord Cranworth: cf. Jegon *v.* Vivian, L. R. 1 C. P. 27, 28, *per* Erle, C. J.

property of which they form a part, although expressed in general terms, will not of necessity imply a power in the tenant for life to make a lease exceeding the term of his own life. Thus, in *Vivian* v. *Jegon*[1] a testator devised his estates to his daughter for her life, without impeachment of waste, and then to her issue male and female, and, in default of such issue, over. The will gave the daughter power to "work or contract for, lease, or set out to be worked and wrought," the mines, &c., under the estates, but provided that the "neat proceeds and profits arising therefrom" should be applied by the daughter with the consent of his trustees in the purchase of other estates, of which the daughter was to receive the rents for her life. The will also provided, that the trustees, with the consent of the daughter or her successor, might exchange the estates. The daughter granted a lease for 60 years. It was contended, that the daughter had power to lease the mines, not merely for her own life, but for any reasonable period that might be found necessary in order to make a beneficial practical lease. But it was held, that the daughter was restricted to making leases for her own life only.[2] It has been held, that, where a tenant for life, who was the donee of a leasing power for 21 years, granted a lease for 26 years, and the lessee expended moneys on the faith of it, he was as the purchaser entitled to have the defective execution aided in equity.[3]

Rents.

A power to lease at the best and most approved yearly rent has been held to have been well exercised by reserving an ore rent; ore being analogous to money, and a reservation of it going, on the death of the tenant for life, to the remainderman accordingly.[4] A power to a tenant for life, without impeachment of waste, to grant mining leases for such terms, "and under and subject to such rents and reservations and agreements," as to him "shall seem reasonable and proper," has been held to have been well exercised by granting a lease at a peppercorn rent by way of mortgage.[5]

[1] L. R. 3. H. L. 285.

[2] Affirming Jegon *v.* Vivian, L. R. 2 C. P. 422, which reversed S. C. L. R. 1 C. P. 9. In Ernest *v.* Vivian, 33 L. J. Ch. 513, this point was expressly left open: see p. 517.

[3] Campbell *v.* Leach, Amb. 740.

[4] *Ib.*

[5] Taylor *v.* Mostyn, 51 L. J. Ch. 696: affirmed W. N. 1883. p. 87.

Where a settlement or will contains a power to grant leases of mines or quarries, it should also contain express provisions as to the mode of dealing with the proceeds. Having regard to the fact, that a lease of mines or quarries is, in most respects, substantially the same as a sale,[1] it may otherwise be doubtful, whether the intention is, that the proceeds shall be treated as capital, or as income. In most cases the fairest course for all the beneficiaries will be to provide a similar destination for the proceeds of a lease to that provided for the proceeds of a lease under the Settled Land Act, 1882.[2] Application of rents.

SECT. 4.—CORPORATIONS.

a. Crown Lands.[3]

The Commissioners of Woods, Forests, and Land Revenues[4] may, with the consent of the Commissioners of the Treasury, lease any mines or quarries (other than mines of gold or silver) beneath or within any of the Crown lands for any term not exceeding sixty-three years from the time of making the lease.[5] There may be reserved either an annual rent in money, or a rent partly in money and partly in kind, or a rent or duty upon the quantity or value of the produce.[6] And, with the approval of the Commissioners of the Treasury, a fine may be taken.[7] And, generally, the lease may be upon such conditions, and may contain such covenants and stipulations, as the Commissioners of the Treasury may approve.[8] And, as the lessee may be made dispunishable for waste,[9] a lease may be granted as well of new mines or quarries as of those already opened.[10] And licenses as well as leases may be granted.[11] Comms. of Woods may lease.

[1] *Ante*, p. 169.

[2] *Ante*, p. 167.

[3] The general law only as to Crown lands is here stated. As to quarries within the Hundred of St. Briavels in Gloucestershire, see *post*, Chap. XX.

[4] See *ante*, p. 145, n. [2].

[5] 10 Geo. 4, c. 50, s. 22: Crown Lands Act, 1873, 36 & 37 Vict. c. 36, s. 4.

[6] 10 Geo. 4, c. 50, s. 33.

[7] The Crown Lands Act, 1866, 29 & 30 Vict. c. 62, s. 3. See, as to the previous state of the law, 10 Geo. 4, c. 50, ss. 28 *et seq.* Fines may also be taken on granting a license for the making of an underlease, assignment or other disposition: 29 & 30 Vict. c. 62, s. 3.

[8] 36 & 37 Vict. c. 36, s. 4.

[9] 10 Geo. 4, c. 50, s. 27.

[10] As to open and new mines or quarries, see *ante*, pp. 22 *et seq.*

[11] 29 & 30 Vict. c. 62, s. 3. As to licenses, see *post*, Chap. XII.

Application of rents.

One moiety of the net annual income received by the Commissioners of Woods in respect of mining leases must be carried to the account of the capital of the land revenue of the Crown, and the other moiety to the account of the income of such land revenue.[1] And provisions exist for the purpose of ascertaining the amount of the net income.[2]

b. Duchy of Cornwall Lands.

Prince of Wales may lease.

By the Duchy of Cornwall Man. Act, 1863,[3] the Prince of Wales, as Duke of Cornwall, may demise any mines or quarries, whether opened[4] or not (with power to the grantee to work, get, carry away, and dispose of the minerals, and to do all acts necessary or expedient therefor), for any term not exceeding thirty-one years in possession, but not in reversion; so that upon every such demise there be reserved a reasonable amount of rent, royalty, dues, toll, or dish; and so that no fine be taken,[5] except in certain specified cases.[6] And he may grant a new lease on the surrender of any existing lease;[7] and he may accept a surrender of any lease, and grant separate leases.[8] All leases must be enrolled in the Duchy office within six months.[9]

Tywarnhaile and Tywarnhaile Tyas.

The lord of the manor of Tywarnhaile Tyas in Cornwall and the Duke of Cornwall are empowered, by agreement in writing, enrolled in the Duchy office, to provide for and regulate the granting, demising, and working of all tin mines, tin ore, tin dues, and tin toll under the demesne and conventionary lands of the assessional manor of Tywarnhaile in the same county, and under the lands within the manor of Tywarnhaile Tyas; and the collecting, recovering, and dividing the profits and advantages accruing therefrom; and the doing of all incidental matters.[10]

[1] S. 2.
[2] *Ib.*
[3] 26 & 27 Vict. c. 49.
[4] As to open and new mines or quarries, see *ante*, pp. 22 *et seq.*
[5] S. 21.
[6] S. 23.
[7] S. 26.
[8] S. 27.
[9] Ss. 30 *et seq.* For provisions for the case of their being no duke or of his being under age, see *ante*, p. 146.
[10] 11 & 12 Vict. c. 83, s. 2. As to the assessional manors, see *ante*, p. 38.

c. Greenwich Hospital Lands.

Admiralty may lease.

The Admiralty[1] are empowered by the Greenwich Hospital Act, 1865,[2] to grant mining leases for any term not exceeding forty-two years. And the lessee may be made dispunishable for waste. But every such lease must take effect in possession, and not in reversion; and the best yearly rent must be reserved; and no fine must be taken; and every lease must contain a condition of re-entry on non-payment; and the lessee must execute a counterpart, and must thereby covenant for payment of the reserved rent.[3] Rent may be reserved by way of toll, duty, royalty, or reservation, by the acre, the ton, or otherwise.[4]

d. Church Lands.

(a) Generally.

Archbishop or bishop.

An archbishop or bishop, being disabled from opening or working new mines or quarries,[5] cannot, of course, of his own will, grant leases of the right to do so. But an archbishop or bishop, to whom lands have been assigned as an endowment under the Act 23 & 24 Vict. c. 124,[6] may, with the approval of the Estates Committee of the Ecclesiastical Commissioners, from time to time grant mining leases of any such lands for such periods, for such considerations, upon such terms, and in such manner, as such committee under the circumstances of each case may think fit. But the committee may require that any portion of the rent reserved shall be payable to the Ecclesiastical Commissioners.[7] At common law, a Dean and Chapter had complete power to grant leases of all mines and quarries beneath or within their lands, and to apply the rents reserved to their own benefit.[8] But since the passing of the restraining Acts,[9] it has always been held, that a Dean and Chapter cannot grant leases

Dean and Chapter.

[1] By the Greenwich Hospital Act, 1865, all lands, which at the commencement of the Act, were vested in the Commissioners of Greenwich Hospital, were transferred to, and became vested in, the Admiralty: see s. 22.

[2] 28 & 29 Vict. c. 89.

[3] S. 29.

[4] *Ib.*

[5] See *ante*, p. 77.

[6] See *ante*, pp. 77, 78.

[7] S. 8.

[8] See Marlborough *v.* St. John, 5 De G. & Sm. 179, 180: see *ante*, p. 78.

[9] *Ante*, p. 78.

of their lands, dispunishable of waste; such leases being deemed to be within the equity of the Acts.[1] And, since the Act 31 & 32 Vict. c. 114,[2] a Dean and Chapter are expressly disabled from granting leases dispunishable of waste.[3] A parson, being disabled from opening or working new mines or quarries,[4] cannot, of course, of his own will, grant leases of the right to do so. And his power to grant such leases, even with the consent of his patron or patrons,[5] and ordinary, is in general, since the passing of the restraining Acts,[4] as doubtful as his right to open new mines or quarries with the like consent.[6]

Parson.

(β) *Ecclesiastical Leasing Acts—Farming and Building Leases.*

Eccl. corps. may lease.

Under the provisions of the Eccl. Leas. Act, 1842,[7] as extended by the Eccl. Leas. Act, 1858,[8] every ecclesiastical corporation, aggregate or sole (with certain exceptions),[9] may, demise any mines or quarries belonging to such corporation, in consideration or partly in consideration of premiums or not, or for such other considerations, and for such term or terms, and under and subject to such covenants stipulations conditions and agreements on the part of the lessee, and generally in such manner, as the Ecclesiastical Commissioners shall think proper and advisable; and may grant incidental rights of opening and working, and of working any adjacent mine by way of outstroke[10] or other underground communication; and may also grant such portion of land belonging to such corporation, and all such rights and liberties of way and passage, wayleaves and waterleaves, and other rights, easements, and facilities for the opening and working of all such mines or quarries, and leading and carrying away the produce thereof, or otherwise incident to mining operations, as shall be deemed expedient.[11] And exist-

[1] See Worcester's Case, 6 Rep. 37 a.

[2] See *ante*, p. 78.

[3] S. 9. As to leases by Prebendaries, Rectors, &c., see 24 & 25 Vict. c. 105; 25 & 26 Vict. c. 52.

[4] See *ante*, p. 79.

[5] See Doe *v.* Collinge, 7 C. B. 939.

[6] See *ante*, p. 80.

[7] 5 & 6 Vict. c. 108.

[8] 21 & 22 Vict. c. 57. The Eccl. Leas. Acts do not apply to the Isle of Man: 37 & 38 Vict. c. 96; 38 & 39 Vict. c. 66 (Stat. Law Rev.): see *post*, Chap. XXI., Sect. 2 (a).

[9] See 5 & 6 Vict. c. 108, ss. 1, 6.

[10] See *post*, Chap. XI., Sect. 4 (a).

[11] 5 & 6 Vict. c. 108, ss. 4, 6; 21 & 22 Vict. c. 57, s. 1.

ing leases may be surrendered and renewed.[1] And contracts and licenses to search for mines, and other powers preliminary to or consequent upon contracts, may be entered into, granted, and varied in such manner and for such considerations as to the Ecclesiastical Commissioners may appear desirable.[2] However, leases cannot be granted, if the convenient enjoyment of any palace of an archbishop or bishop would be prejudiced.[3] And every lease, contract, licence, or power, must be granted or entered into with the approval of the Ecclesiastical Commissioners; and (if made by the incumbent of a benefice) with the consent of the patron; and (if made of copyhold mines or quarries, or of watercourses, ways, or easements, in, upon, over, or under, copyhold lands, where the copyhold or customary tenant is not authorized to make leases for the term of years intended to be created by such lease) with the consent of the lord.[4]

But must comply with statutory requirements.

In the case of any lease granted under the Act of 1842 (unless it be granted subsequently to the Act of 1858 by any rector, vicar, or incumbent with cure of souls[5]) such portion of the improved value accruing thereunder, as by order in council shall be determined, not being more than three-fourths nor less than a moiety of such improved value, must be paid to the Ecclesiastical Commissioners, and be subject to the provisions relating to moneys payable to them; and the remainder of such improved value is deemed to be an improvement within the meaning of the provisions relating to the incomes of archbishops and bishops, deans and canons, archdeacons and incumbents of benefices.[6] In the case of any lease granted under the Act of 1858, all moneys received in respect thereof must be applied in the same manner as moneys received in respect of sales.[7]

Application of rents.

[1] 5 & 6 Vict. c. 108, ss. 5, 16.

[2] 21 & 22 Vict. c. 57, s. 4.

[3] 5 & 6 Vict. c. 108, s. 9.

[4] S. 20: see also the following sections.

[5] See 21 & 22 Vict. c. 57, s. 10.

[6] 5 & 6 Vict. c. 108, s. 14.

[7] See s. 2; *ante*, p. 147. Ecclesiastical corporations, empowered under 14 & 15 Vict. c. 104 (as to the duration of which, see s. 12), to sell, enfranchise, or exchange their lands, and to lay out the moneys to arise therefrom in the purchase of other lands, were empowered, with the approval of the Church Estates Commissioners, from time to time to grant mining leases of such other lands for such considerations, upon such terms, and in such manner, as the Commis-

Farming and building leases.

By the Act empowering incumbents to grant farming and building leases[1] it is provided, that, in every case where the right is exercised, a clause shall be inserted excepting the mines and minerals. But consistently with that the lessee may be authorized to take brick earth, stone, lime, and other materials for erections and repairs.[2] And ecclesiastical corporations, aggregate or sole, empowered under the Eccl. Leas. Act, 1842, to grant building leases, may, as incident thereto, give liberty to the lessee to dig, take, carry away, and dispose of such earth, clay, sand, loam, or gravel, as it shall be found convenient to remove for building or repairing purposes.[3]

e. University and College Lands.

Certain universities and colleges may lease.

The Universities of Oxford, Cambridge, and Durham, and every College therein, and the Colleges of Winchester and Eton, may, under the Universities and College Estates Act, 1858,[4] lease any mines or quarries in any lands belonging to such University or College; either with or without any messuages, buildings, or lands convenient to be held or occupied therewith; and either with or without the surface of the lands containing

sioners, under the circumstances of each case, might think fit. And the Commissioners might have required that any portion of the rent received should be laid out in the purchase of other lands for the benefit of the demising corporation, or otherwise applied as therein mentioned. See s. 9.

[1] 5 & 6 Vict. c. 27.

[2] S. 1.

[3] 5 & 6 Vict. c. 108, s. 1. Special provisions exist for regulating the relations between the Ecclesiastical Commissioners, or ecclesiastical corporations, and their former tenants of mines or minerals, who are entitled to have their leases renewed. By the Act 23 & 24 Vict. c. 124, it is provided (s. 22), that the Ecclesiastical Commissioners, or any ecclesiastical corporation, aggregate or sole, shall, in granting to a lessee, whether for years or for lives, an extended term, and in fixing the terms of such grant, have regard to the value of the interest of the lessee under any lease theretofore ordinarily renewable on payment of a fine, and shall, as a rule, in computing such value, estimate and include an extension of the existing unexpired term to the 11th of October, 1884, at the accustomed rate of fine; and, in the case of any lease for life, which, according to the expectancy of human life, would not determine until after the 11th October, 1884, shall have regard to the actual value of the interest of the lessee. And, in case the lessee requires an extended term to be granted to him, and differences arise between him and the lessors in respect thereof, such differences are (ss. 23, 41) determinable by arbitration under the provisions of the Com. Law Proc. Act, 1854.

[4] 21 & 22 Vict. c. 44.

such mines or quarries; and whether the same shall or shall not have been previously opened or worked;[1] for any term not exceeding 60 years, to take effect in possession, and not in reversion or by way of future interest; with full power to work and raise the minerals, and to work any adjacent mine by way of outstroke[2] or other underground communication, and to do all things necessary for winning, working, getting, cleansing, and smelting the minerals, and manufacturing and carrying them away, or otherwise incident to mining operations. However, leases cannot be granted, if the convenient enjoyment of any house or building forming part of or attached to any College, or the offices or gardens thereto belonging, would be prejudiced.[3] And in every lease there must be reserved the best rent, in money, or tolls, duties, royalties, and reservations, by the acre, the ton, or otherwise, that can be reasonably obtained, without taking any fine or premium: and the lessee must covenant to pay the rent, and all taxes, charges, rates, assessments, and impositions affecting the demised lands: and the lease must contain a proviso for re-entry on non-payment of the rent, or (except as to such covenants as the University or College may think fit to except) non-performance of the covenants: and the lessee must not be authorized to commit waste except for the purposes aforesaid: and must execute a counterpart: and must enter into such other covenants as the University or College shall deem expedient; due regard being had to the custom of the country or district in question.[4] Wayleaves and waterleaves may be granted for a like term.[5] And leases may be surrendered and renewed.[6] And licenses may be granted to dig gravel, sand, earth, loam, or clay suitable for making bricks or tiles out of any part of the lands belonging to the demising University or College for such considerations as may be considered reasonable.[7] And, in granting building and repairing leases, the lessee may be authorized to dig, take, and carry away and dispose of, such earth, clay, sand, or gravel, as it shall be found convenient to remove.[8]

But must comply with statutory requirements.

Incidental powers.

[1] As to open and new mines or quarries, see *ante*, pp. 22, *et seq.*
[2] See *post*, Chap. XI., Sect. 4 (α).
[3] S. 26.
[4] S. 20
[5] S. 19.
[6] S. 22.
[7] S. 15.
[8] S. 11.

Application of rents.

One equal third part of the net rents and reservations received in respect of any mining lease, and of the net moneys received in respect of any license, must be applied as part of the ordinary income of the University or College. And the remainder must be applied either in the purchase of lands for the benefit of the University or College; or in the erection of new or improvement of existing buildings; or in the improvement of lands belonging to such University or College; or in the purchase of easements in respect of adjoining lands: and, in the meantime, it must be invested, and the income applied as part of the ordinary income of the University or College.[1]

f. Charity Lands.

Trustees of charities may lease.

The trustees of any charity lands may, on satisfying the Charity Commissioners, that the letting of any part of the charity lands on leases for working any mine, or that the digging for or raising of stone, clay, gravel, or other minerals, would be for the benefit of the charity, and on obtaining their authority, and although such leases or acts may not be authorized or permitted by the trust, grant such leases or do such acts.[2]

g. Materials for Roads.

Materials for roads.

Trustees or commissioners of turnpike roads are empowered to contract for the demise from any person of any land for the purpose of digging materials for the repair or use of the roads.[3]

Sect. 5.—LANDS IN IRELAND.

Mines in Ireland may be leased.

Every archbishop, bishop, dean, dean and chapter, archdeacon, prebendary, and other dignitary ecclesiastical, parson, rector,

[1] Ss. 15, 21.

[2] See Char. Trusts Act, 1853, 16 & 17 Vict. c. 137, ss. 21, 26; Char. Trusts Amend. Act, 1855, 18 & 19 Vict. c. 124, ss. 38, 39. See also Char. Trusts Amend. Act, 1855, s. 29. As to the acting trustees of a charity, see Char. Trusts Amend. Act, 1855, s. 16.

[3] 3 Geo. 4, c. 126, s. 100. As to purchases, see *ante*, p. 148. Where an allotment is made to a surveyor of highways under the Incl. Act, 8 & 9 Vict. c. 118, and no direction is made as to the ownership of the grass and herbage, the surveyor must let the allotment, reserving the right to get and take away the stone, gravel, and other materials. S. 72: see *ante*, p. 156.

vicar, body politic and corporate, college, cathedral, or collegiate church, and hospital; and every trustee for charitable or other purposes or for any *feme covert* or infant of freehold or certain other specified estates; and every tenant for life with an immediate remainder to his first and every other son in tail male; and every tenant in dower or curtesy with the consent of the immediate reversioner or remainderman for an estate of inheritance, or (in case of the nonage, idiotcy, or lunacy of the latter) with the consent of the guardian or committee with the approbation of the Lord Chancellor; may grant leases not exceeding forty-one years of mines and minerals in Ireland within his or their lands. And such leases may comprise certain specified quantities of land contiguous to the mines and minerals for the convenient erection thereon of workmen's houses and smelting houses and other necessary buildings.[1] But every such lease must commence in possession without any fine: and the best rent, whether in money or kind, must be reserved: and every such lease must contain a condition for re-entry on non-payment; and the lessee must execute a counterpart.[2] And existing leases may be surrendered and re-granted.[3] Where mines have been excepted from a grant of lands in Ireland, the person entitled to the rent, in fee simple, fee farm, fee tail, or for life, with immediate remainder to his own issue, has, in respect of the mines, similar leasing powers.[4]

But statutory requirements must be complied with.

Incidental powers.

[1] 46 Geo. 3, c. 71, s. 1; 11 & 12 Vict. c. 13, ss. 1, 2; and the Acts therein mentioned.

[2] 11 & 12 Vict. c. 13, s. 1; 38 & 39 Vict. c. 66 (Stat. Law Rev.).

[3] 11 & 12 Vict. c. 13, s. 3.

[4] 46 Geo. 3, c. 71, s. 1; 11 & 12 Vict. c. 13, s. 1; 23 & 24 Vict. c. 154, s. 32.

CHAPTER IX.

CONTRACTS.

Sect. 1.—GENERALLY—STATUTE OF FRAUDS—AMBIGUITY OR UNCERTAINTY.

(a) *Generally.*

Contract respecting land includes, *primâ facie*, everything beneath.

A CONTRACT to sell or grant a lease of land will generally include the entire *solum* from the surface down to the centre of the earth. It will generally, therefore, include the mines, quarries, and minerals beneath or within it.[1] However, where a railway company or a waterworks company give notice to take lands under the Rail. Cl. Cons. Act, 1845,[2] or the Wat. Cl. Act,[3] they should, if they wish to take the mines and minerals thereunder, expressly include them in their notice. They will not have the right to do so in the absence of express mention.[4] In like manner, a statutory commutation of manorial rights may, if expressly agreed upon, but not otherwise, be made to extend to mines, minerals, and quarries.[5] And no compulsory enfranchisement can affect the rights of any lord or tenant in mines, minerals or quarries, or incidental liberties, unless with the express consent in writing of such lord or tenant.[6]

Exceptions.

Right of preemption.

A covenant giving an unlimited right of preemption of mines is obnoxious to the rule against perpetuities.[7] Subject to this a covenant giving a right of preemption runs with the land; so as to be capable of enforcement by the assigns of the covenantee against the devisees of the covenantor.[8]

[1] Williamson *v.* Wootton, 3 Dr. 213; Kerr *v.* Pawson, 25 Beav. 406.

[2] See 8 & 9 Vict. c. 20, s. 77.

[3] See 10 & 11 Vict. c. 17, ss. 12, 18.

[4] Met. R. Co. and Cotton's Trustees, 45 L. T. 103; Errington *v.* Met. R. Co., 19 Ch. D. 560, 573, 574; *ante*, p. 142.

[5] *Ante*, p. 149.

[6] *Ante*, p. 150.

[7] See L. & S. W. R. Co. *v.* Gomm, 20 Ch. D. 562; overruling, on this point, Birmingham Canal Co. *v.* Cartwright, 11 Ch. D. 421.

[8] Birmingham Canal Co. *v.* Cart-

Construction—contract or lease.

It is sometimes a question, whether a mining instrument is a contract for a lease or an actual lease. In *Jones* v. *Reynolds*,[1] the defendant wrote to the plaintiff:—"I shall be happy to take a lease of your iron ore at N., and I will engage to work the several veins, &c., the term to be four years from the 24th of June next, ... the relative proportions of the iron ores in weight to be worked together to be ascertained by a competent person." The plaintiff replied:—"I agree to the terms contained in your letter, and shall be ready to grant a lease conformable thereto, &c., when you require me." It was held, that an agreement for a lease had been entered into. In *Doe* v. *Powell*,[2] the lessor agreed to "let and grant a lease" at a rent "to commence in a year from the time a pit is sunk through the four-foot coal," with power to work the said minerals, and to deposit rubbish and make a wharf; and the lessee agreed "to commence working a pit before the 24th of June next;" and the lessor engaged that "he had not incumbered;" and the lease was to "contain the usual covenants, &c., as entered into by" the lessor's brother; and the lessor engaged "to sign a lease upon the said terms as soon as it can be prepared." No possession had been given at the time, nor was any stipulated for. It was held, that an agreement for a lease had been entered into.

(β) *Statute of Frauds.*

Mine or quarry—sole owner.

A contract by the sole owner of a mine or quarry for the sale thereof, or of any interest therein, or for the grant of a lease thereof, without more, must, to be enforceable, be in writing signed by the party to be charged, pursuant to the fourth section of the Statute of Frauds.[3] And a verbal contract between the owner of a mine and another person, that the mine shall be demised upon royalties, and the royalties divided between them, has been held to be, in substance, a contract for the sale and

wright, 11 Ch. D. 421. As to damages for breach of such a covenant, see Mundy *v.* Rutland, 23 Ch. D. 81, 94, 95.

[1] 1 Q. B. 506.

[2] 8 Scott N. R. 687; 7 M. & G. 980.

[3] See Cheadle *v.* Proctor, 19 L. T. N. S. 289.

purchase of a share in the mine itself, and, as such, inoperative.[1] In a conveyance of land, excepting the mines, the vendor covenanted, that, upon a certain event happening, he would offer the mines to the purchaser, and give him the refusal of them for one month. It was held, that the offer was obliged to be in writing; and that, consequently, the non-acceptance within a month of a parol offer did not deprive the covenantee of his rights.[2] However, a person, who would not otherwise be bound, may be bound by ratifying the contract.[3] And part performance will take a case out of the statute.[4] It is not necessary, that a contract to share the profit and loss in the working of a mine or quarry, which does not affect the ownership of the land itself, should be in writing.[5]

Co-owner.

A contract by the co-owner of a mine or quarry for the sale of his share, must also, to be effectual, be in writing signed by the party to be charged.[6] And a contract for the transfer of a share of the profit and loss in the working of a mine or quarry, which affects the ownership of the land itself, must also be in writing.[7] If, however, although not in writing, it has been partly performed, it may be enforced.[8]

Partner in working.

Ordinary partner.

Where mines or quarries are vested in trustees for a partnership or a company in trust for the individual members in proportion to their shares, the interest of each member includes an interest in the land itself, as well as in the profits of its employment; and, so far as it is an interest in land, a contract for the transfer of it must be in writing signed by the party to be charged.[9] Frequently, however, mines or quarries are vested in trustees for a partnership or a company in trust for the undertaking generally, and not for the individual members in proportion to their shares. In the latter cases the trustees hold the land in trust to use it, and make profits, as

[1] Caddick *v.* Skidmore, 2 De G. & J. 52.

[2] Birmingham Canal Co. *v.* Cartwright, 11 Ch. D. 421: overruled upon another point: see *ante*, p. 182 n. 7.

[3] See Fothergill *v.* Phillips, 6 Ch. 770, 778.

[4] See Pollard *v.* Clayton, 1 K. & J. 471.

[5] See Forster *v.* Hale, 5 Ves. 314.

[6] See Boyce *v.* Green, Batty 608; Watson *v.* Spratley, 10 Exch. 222.

[7] See Caddick *v.* Skidmore, *u.s.*, 52, 56.

[8] Burdon *v.* Barkus, 4 De G. F. & J. 47.

[9] Watson *v.* Spratley, *u. s.*

part of the stock in trade, and then to divide those profits between the members in proportion to their shares. In the latter cases, therefore, the members are not entitled either to land, or to any interest in land, within the fourth section of the Statute of Frauds.[1] And the same considerations apply, where, instead of mines or quarries being vested in trustees for a particular association for the benefit of the undertaking carried on by it, they are vested in the association itself for the benefit of the undertaking.[2] Where mines or quarries are vested in trustees for a partnership or company in trust for the undertaking generally, a contract to sell shares therein is not a contract for the sale of "goods, wares, and merchandize" within the 17th section of the Statute of Frauds.[3] Accordingly, such a contract, not being within either the 4th or the 17th section of the statute, is good, although entered into by parol.[4]

Minerals

A contract for the sale of minerals already severed is, of course, a contract for the sale of "goods, wares, or merchandize" within the 17th section of the Statute of Frauds.[5] So also in the case of minerals not already severed;[6] conversion into chattels by severance being contemplated.

(γ) *Ambiguity or Uncertainty.*

Ambiguity.

If it is intended, that a mine or quarry shall belong separately to one or more members of a partnership, instead of being the common property of the firm; or shall become the common property of the firm, instead of belonging separately to one or more of the members; the contract to that effect should be clear and unambiguous. In *Hills* v. *Parker*,[7] where the lessee of certain salt works had taken in a partner to work them, it was held, that the acts and conduct of the parties had constituted

[1] See Watson *v.* Spratley, 10 Exch. 222; Hayter *v.* Tucker, 4 K. & J. 249. The fact of the concerns having been cost-book mines is immaterial. See also Powell *v.* Jessopp, 18 C. B. 336; Walker *v.* Bartlett, *ib.*, 845, 859.

[2] See Watson *v.* Spratley, *u. s.*

[3] Watson *v.* Spratley, *u. s.*: see also Pickering *v.* Appleby, 1 Com. 353.

[4] Watson *v.* Spratley, *u. s.*

[5] Hickman *v.* Haynes, L. R. 10 C. P. 601.

[6] See Dart 203, citing Coulton *v.* Ambler, 13 M. & W. 403; a decision upon a navigation Act.

[7] 7 Jur. N. S. 833; reversing Parker *v.* Hills, 5 *ib.*, 809.

the saltworks a partnership asset. In *Burdon* v. *Barkus*,[1] on the other hand, it was held, under all the circumstances of the case, that a seam of coal, which had, prior to the formation of a partnership, been leased to one of the partners, did not form part of the partnership property, but remained the separate property of the lessee. However, the other partner, who, under the impression that the lease was a partnership asset, had concurred in a large expenditure in the erection of works for winning the seam, was upon the dissolution held entitled to a fair allowance.[2]

Uncertainty.

It has been decided, that an agreement to lease two seams of coal known as the two-feet coal and the three-feet coal, "lying under land to be hereafter defined in the Bank-end Estate," meant, "lying under land in the Bank-end Estate, the boundaries of which were to be thereafter defined;" and was not therefore so indefinite as to prevent its being enforced.[3] However, where an agreement was entered into for a lease of the "ironstone lying under the lands of Sir H. Trafford, Bart., situate at Patricroft," Patricroft not being a place with defined territorial limits; and the lessee stipulated for liberty to try the mine for a year without any liability for dead rent, and for liberty to abandon it at the end of that time; and the lessee expended a considerable sum in trying the mine in exercise of his liberty; it was held (1), that the agreement was too uncertain to entitle the lessee to enforce it; and (2) that he was not entitled to any damages for his outlay.[4] And where an agreement was entered into to lease the minerals under certain land to the west of a fault supposed to run through the land in the direction of a line drawn on a plan referred to in the agreement; and the quantity of land was described as "supposed to be 83 acres or thereabouts;" and a similar agreement was entered into to lease the minerals to the east to a second lessee, "supposed to be 98 acres or thereabouts;" and each agreement provided for the payment of a dead rent; and the fault was afterwards found to run, so as to leave on the west eight acres only; it was held, that the second agreement could not have been enforced by the second lessee.

[1] 3 Giff. 412; 4 De G. F. & J. 42.

[2] See Set. 1200.

[3] See Haywood v. Cope, 25 Beav. 140.

[4] Lancaster v. De Trafford, 31 L. J. Ch. 554.

It was considered (1), that the case was not one of mere *falsa demonstratio*, but that the intention was to demise the minerals bounded by the fault, if fault there were in the direction marked on the plan. It was also considered (2) that the agreement could not, having regard to the provisions as to dead rent, be considered a chance agreement as to the amount of minerals to be comprised in the lease; and that, although the words "or thereabouts" might possibly have covered a trifling deviation in the line of the fault, they could not cover a deviation to the extent in question.[1] And where an agreement was entered into for the sale of land; with clauses, that in the event of there being any coals or ironstone thereunder, a royalty of 6*d.* per ton should be paid thereon, and that any mines required to be left by a certain railway company should be paid for, as if gotten, out of the money to be received for them from the company; it was held, that it was too uncertain to be enforceable.[2] And, of course, an agreement to lease "coals, &c.," can seldom be capable of enforcement.[3]

SECT. 2.—TITLE—NON-EXISTENCE OF MINE OR QUARRY.

(*a*) *Abstract of Title.*

Abstract of title.

A purchaser of a mine or quarry; or of any share or interest therein, which is, or includes, a share or interest in the land itself; is entitled to a regular abstract of title.[4] A purchaser of a share in a mining concern, which does not include any interest in the land itself, is not entitled to an abstract; but only to such evidence of the constitution of the concern, and of the nature of the title under which the land is worked, as will show, that the subject-matter of the purchase is what it professes to be, and that the proposed form of transfer will give him a valid title to the share.[5]

[1] Davis *v.* Shepherd, 1 Ch. 410, 415 *et seq.*

[2] Williamson *v.* Wootton, 3 Dr. 210.

[3] See Price *v.* Griffith, 1 De G. M. & G. 80. A reservation in an agreement for a lease of "all customary rights and reservations," such as liberty to "search for and work mines or minerals, &c.," has been held not to render the agreement void for uncertainty: see Parker *v.* Taswell, 2 De G. & J. 559.

[4] Curling *v.* Flight, 2 Ph. 613, 617.

[5] *Ib.*

(β) *Contract dealing with Land generally.*

If mines or quarries exhausted, or third party has right to work, vendor cannot enforce, and purchaser can enforce with compensation.

A contract to sell land will generally, as has been already seen,[1] include, not merely the surface, but the mines, quarries, and minerals beneath it. If, therefore, the mines or quarries have been exhausted or partly exhausted by working; or their ownership is in a third party; or there is a right in a third party to enter and work them; the vendor cannot in general enforce the contract; and, on the other hand, the purchaser can in general enforce it with compensation.[2] And in the case of a third party having the ownership, or the right to work, the position of the purchaser is not affected, however long the third party may have refrained from exercising, and however little he may show his intention to exercise, his rights.[3] Nor in the case of a third party having the ownership, is the position of the purchaser affected, although the third party may be disentitled to work without the surface owner's consent.[4] Nor is it affected, however difficult it may be to estimate the compensation, if, with the assistance of experts, a probable estimate is possible.[5] Nor is it affected by the fact, that no proof has been given of the actual existence of the mines or quarries, if no proof has been given of their non-existence.[6] But it will be affected by proof of their actual non-

Exceptions.

[1] *Ante*, p. 182.

[2] Seaman *v.* Vawdrey, 16 Ves. 390; Barton *v.* Downes, Fl. & K. 505; Martin *v.* Cotter, 3 J. & L. 496; Hayford *v.* Criddle, 22 Beav. 480; Ramsden *v.* Hurst, 27 L. J. Ch. 482; Pretty *v.* Solly, 26 Beav. 606; Bunbury's Estate, 1 Ir. Rep. Eq. 458; Mawson *v.* Fletcher, 6 Ch. 91, 94; Upperton *v.* Nickolson, 10 Eq. 228, 230; 6 Ch. 436. In the last case land sold as freehold had been enfranchised under the Enfranchisement Acts: sec. as to this, *ante*, p. 150.

[3] Seaman *v.* Vawdrey, *u. s.*; where there had been no exercise for 106 years. See also Ramsden *v.* Hurst, *u. s.* An Anonymous case is referred to by Lord St. Leonards (Vend. & Pur. last edit., p. 393), in which a purchaser of an estate, with some valuable mines, which were under a common, was compelled to complete, on the ground, that obstruction by the commoners was highly improbable. But the authority of the case is doubted by Mr. Dart (1105, 1106); and it is obviously inconsistent with Seaman *v.* Vawdrey, *u. s.*, and the other cases cited in the preceding note. See however Lyddal *v.* Weston, 2 Atk. 19. See further, as to the doctrine of non-user as applied to mines, *post*, Chap. XXII., Sect. 1, *b*.

[4] See the Sc. decision of Whyte *v.* Lee, 6 Sess. Cas. (4th Ser.) 699.

[5] Ramsden *v.* Hurst, *u. s.*, *per* Kindersley, V. C. See however Bunbury's Estate, *u. s.*

[6] Barton *v.* Downes, *u. s.*; Martin *v.* Cotter, *u. s.*; Ramsden *v.* Hurst, *u. s.*, notwithstanding Lyddal *v.* Weston, *u. s.* It is hardly possible (except by shewing that they have been worked out) to prove the non-existence of

existence, or of the cesser of the right to work them.[1] And, although a vendor, who purports to include mines or quarries in his contract, without having any title to them, cannot avail himself of a subsequent verbal communication of his want of title; so as to force the contract on the purchaser:[2] the purchaser cannot, on the other hand, if, with knowledge of the fact, and without objecting, he has gone into possession, subsequently insist upon being compensated.[3] And, if the subject-matter of a contract is copyholds; or if a vendor agrees to enfranchise copyholds, and to sell them as freeholds; it is not necessary to explain, in the one case, that the right of property in the mines and quarries is, in general, in the lord;[4] or, in the other, that the transaction must take place with reference to statutes,[5] which cannot affect the lord's right without his consent:[6] such matters being notorious. And, upon a sale of lands within the districts, in which the various local customs prevail,[7] it does not seem to be necessary to refer to the existence of the mining rights under such customs:[8] such matters being also notorious. And a purchaser of land containing mines or quarries, which have been exhausted or partly exhausted by working, cannot decline the contract, if he has known of the working:[9] or even if, without actual knowledge of the extent of the working, he has known, that some working has taken place; the maxim of "*caveat emptor*" in such a case applying.[10] And where a third person is in possession of and working mines or quarries, knowledge of the title under which such possession is held will be imputed to a purchaser of the land containing such mines or quarries.[11] And such possession, to be effectual, need not be continually visible, or without cessation actively asserted.[12] And, in doubtful cases, the position of a purchaser of land con-

"minerals;" having regard to the extensive meaning which that word has at the present day: see Gowan *v.* Christie, L. R. 2 Sc. & D. 277: see *ante*, p. 12.

[1] Lyddal *v.* Weston, 2 Atk. 19; Seaman *v.* Vawdrey, 16 Ves. 390; Martin *v.* Cotter, 3 J. & L. 496.

[2] Smithson *v.* Powell, 20 L. T. 105.

[3] *Ib.*

[4] Hayford *v.* Criddle, 22 Beav. 480: see *ante*, p. 34. It is sometimes in the copyholder: see *ante*, p. 34 n. [2].

[5] See *ante*, p. 150.

[6] Kerr *v.* Pawson, 25 Beav. 394, 408.

[7] See *post*, Chaps. XVIII., XX., XXI.

[8] See Dart, 118.

[9] Colby *v.* Gadsden, 34 Beav. 416, 421.

[10] *Ib.* 421, 422.

[11] Holmes *v.* Powell, 8 De G. M. & G. 572.

[12] *Ib.* 581.

taining mines may be affected by the circumstance, that the value of the minerals was an inconsiderable ingredient in the price.[1]

Stipulations in contracts.

Where a contract for a lease of smelting works contained no words showing an intention to exclude the underlying mines, and stipulated, that the lessee should covenant to keep in repair, and that the lessor should covenant for quiet enjoyment; and the title to the mines was in a third party; and the lessee went into possession, and the third party worked; and the lessee alleged and the lessor denied, that the workings had injured the demised premises; it was held, that the lessee was entitled to have an unqualified covenant for quiet enjoyment inserted in the lease.[2] Where the conditions of sale, under which land was sold, provided, that if "any objection or requisition be delivered and persisted in, the vendor shall be at liberty to rescind;" and that if "any error or mistake shall appear to have been made in the description of the property or of the vendor's interest therein, such error or mistake shall not vacate the sale," but should be the subject of compensation; and the purchaser objected, that the minerals under the land were in a third party; and the vendor asserted, that he had a good title thereto; it was held, that the vendor was justified in rescinding, and that the purchaser was not entitled to specific performance with compensation.[3]

(γ) *Contract dealing with Mine or Quarry specifically.*

Enforcement not refused because mining property speculative.

Where a contract is entered into to purchase or take a lease of a particular vein of coal; and the vendor or lessor does not warrant the existence of the vein; but the intention of the parties is, in substance, that the purchaser or lessee shall take his chance of finding it; and the vein proves to be a nonentity; the vendor or lessor is not disentitled to enforce the contract. And, in the case of a lease, it is immaterial, that, a dead rent may have been made payable.[4] The enforcement of contracts relating to mines will never be refused merely on account of the speculative character of such property.[5]

[1] Colby *v.* Gadsden, 34 Beav. 416, 421.

[2] Onions *v.* Cohen, 2 H. & M. 354.

[3] Mawson *v.* Fletcher, 10 Eq. 212; 6 Ch. 91.

[4] Jefferys *v.* Fairs, 4 Ch. D. 448.

[5] Haywood *v.* Cope, 25 Beav. 140, 152; Jefferys *v.* Fairs, *u. s.*

SECT. 3.—POSSESSION AND PAYMENT.

Purchaser or lessee entitled to subject-matter as from date of contract.

A purchaser or lessee is entitled, *primâ facie*, to the subject-matter of the contract as from the date of the contract. The consequent liability of a vendor or lessor, who, subsequently to the contract, works and removes minerals out of the land in question, has been already considered.[1]

Sale by Court.

In the case of a sale by the Court, the sale itself, and not its confirmation by the Court, transfers the property; the confirmation relating back to the day of the sale.[2] If, therefore, between the day of sale and the confirmation a mine diminishes in value, "from some accidental cause injurious to the working, from some rival coal mine, or a destructive inundation,"[3] the loss falls on the purchaser.[4] It follows, that the purchaser is entitled to insist on some arrangement being made as to the intermediate management; and an arrangement under which he is allowed to work and manage under the superintendence of the vendor will usually be proper.[5] In the case of a sale by the Court, where no provision is made as to the time of taking possession, the purchaser will be entitled to possession, or to receipt of the rents and profits, from the commencement of the month or week, in which he pays his purchase-money, according to the usual course of taking the account of the profits in question: mineral property being a species of trade, and the profits accruing daily.[6]

Taking possession not an acceptance of title.

The mere taking possession of a leasehold interest in a mine is not an acceptance of the title. It is necessary, that there should be an immediate possession, as the term is running out.[7]

[1] See *ante*, p. 86.

[2] See Fry, 398, 399; where the law on this subject is said to be now settled.

[3] Williams *v.* Attenborough, T. & R. 76. *per* Lord Eldon.

[4] *Ib.*; Fry, 398, 399.

[5] See Williams *v.* Attenborough, *u. s.*

[6] Wren *v.* Kirton, 8 Ves. 502; Williams *v.* Attenborough, *u. s.*, 70, 73, 74. See also *ante*, p. 57 n. [2], and other cases there cited. The rules, which, before 30 & 31 Vict., c. 48, regulated the practice of opening biddings upon a sale by the Court of a landed estate, did not apply, where a colliery was the subject of a sale: having regard to the fluctuations in value to which colliery properties are liable: see Wren *v.* Kirton, *u. s.*; Williams *v.* Attenborough, *u. s.*

[7] Haywood *v.* Cope, 25 Beav. 140, 153.

And where a contract for the purchase of a share in a mining partnership stipulated, that a good title should be made by a specified day, and it appeared to have been the intention, that the purchaser should immediately, and before that day, have possession, he was held not to have waived objections to the title by taking possession and acting as a partner.[1]

Motion to pay purchase-money into Court.

It has been already seen, that where the purchaser of a mine or quarry is, before conveyance, allowed into possession, and commences to work, he may be ordered on motion to pay his purchase-money into Court.[2]

Interim "preservation" under Jud. rules.

In an action for specific performance of an agreement to accept a colliery lease, where the lessee had been allowed into, and had long retained, possession; and had worked the coal; and then threatened to cease pumping; a motion for an injunction to restrain him from ceasing to pump was held to be a proper motion for the "preservation" of the property under O. 52, r. 3 of the Jud. Orders and Rules.[3]

Capacity to sell and payment of price.

Where a contract is entered into to buy and sell a mine or quarry, there must be a capacity to sell before there can be a claim for payment of the price. And where a vendor agreed to sell, and a purchaser agreed to purchase, a share in a mining sett; and it was further agreed to form a company, and that, as soon as the company was registered, the price should be paid; it was held, that, the vendor being unable to make a title, the purchaser was not bound to pay the price.[4]

Sect. 4.—Fraud and Inequality—Delay[5]—Enforcement.

(a) *Fraud and Inequality—Enforcement.*

Fraud or concealment a bar to enforcement.

Fraud, or misrepresentation, or even concealment, will frequently be a bar to the enforcement of a contract to purchase

[1] Stevens *v.* Guppy, 3 Russ. 171. He may be made liable as a partner for the time he acts as such: see Jefferys *v.* Smith, 3 Russ. 158.

[2] *Ante*, p. 86.

[3] Strelley *v.* Pearson, 15 Ch. D. 113. The motion had been ordered to stand till the trial, and before it could be heard the colliery was drowned. The defendant was ordered to pay the costs of the action, and the costs of the motion were made costs in the action.

[4] Marsden *v.* Moore, 4 H. & N. 500.

[5] As to fraud or delay, where rescission or compensation is sought, see *infra*, Sect. 6.

or take a lease of a mine or quarry.[1] And where the owners of a colliery had entered into an agreement with an adjoining landowner for the purchase of his estate; without disclosing the fact, of which he was ignorant, that they had gotten a considerable quantity of coal from under it; it was held, that the purchasers could not enforce the contract. And it was considered immaterial that the sale was not shown to be at an under-value.[2] For the purchasers were bound to give the vendor the opportunity of taking whatever proceedings on account of their trespass he should think proper. And he would have been entitled in such proceedings to obtain a much larger sum as compensation for the wrongful severance than the value of the coal while ungotten.[3] However, where a mine owner had worked mines, and then abandoned them, because the working was unprofitable; and twenty years subsequently entered into negotiations to lease them; and the lessee during these negotiations made a personal inspection of them, and formed an independent estimate of their value; and an agreement for a lease was then entered into; and the mines turned out worthless; the lessor was, having regard to the speculative character of mining property, held entitled to enforce the agreement. And it was considered immaterial that he had suppressed the facts of the former working and the abandonment; and that the lessee professed to be ignorant of mining matters.[4] And fraud may be condoned. And it has been held to be condoned by a purchaser, who, with knowledge of the fact, offered to perform his part of the contract, and required the vendor to do the same within a limited time.

Unless other party not misled.

Or condones.

Knowledge by a purchaser, not in a fiduciary relation to his vendor (such as, for this purpose, probably exists between the tenant for life and the trustees of a settled estate[6]), of the existence of a mine under the land of the vendor, who is ignorant of its existence; and concealment of the knowledge; do not of themselves constitute a fraud. For there is no legal

Fraud by purchaser.

[1] See Haywood *v.* Cope, 25 Beav. 140, 148; Higgins *v.* Samels, 2 J. & H. 460.

[2] Fothergill *v.* Phillips, 6 Ch. 770.

[3] *Ib.* 780: see *post*, Chap. XXII., Sect. 2, *c.*

[4] Haywood *v.* Cope, *u. s.*

[5] Macbryde *v.* Weekes, 22 Beav. 533.

[6] See Dicconson *v.* Talbot, 6 Ch. 32, 37, 38.

obligation on such a purchaser to disclose his knowledge.[1] And the law is the same where the value of a mine, and not its existence, is in question.[2] But of course any contrivance on the part of the purchaser, or even a word or a gesture from him, may give his conduct another complexion.[3] And if the vendor had no means of access to the mine, and the purchaser improperly obtained access thereto, and acquired his knowledge by means of such improper access, his concealment would constitute a fraud.[4]

Inequality.

If a contract stipulates for the insertion of "all usual covenants," its omission to stipulate for the insertion of a covenant to pay a dead rent does not make it objectionable for inequality.[5]

(β) *Delay—Enforcement.*

Delay a bar to enforcement.

Having regard to the fluctuating character of mining property, it is incumbent upon a person, who intends to enforce a contract to sell or purchase, or to grant or take a lease or a renewal of a lease of, a mine or quarry, to be prompt in asserting his title. Such delays as five years and nine months,[6] or three years and five months,[7] or two years and six months,[8] or even eleven months,[9] after the parties had been at arms' length, have long been considered fatal to relief. And, it has, in such cases, been considered immaterial, that the party asserting the title has by an occupation of the surface been in constructive possession of the mine or quarry in question;[10] or has even gone into actual possession of the mine or quarry in question and commenced working it, if, before the parties were at arms' length, such possession was abandoned.[11] Recently, however, delays of even shorter periods, such as five months and four days,[12]

[1] Fox *v.* Mackreth, 2 B. C. C. 420; Turner *v.* Harvey, Jac. 178.

[2] Fothergill *v.* Phillips, 6 Ch. 779.

[3] Walters *v.* Morgan, 3 De G. F. & J. 718, 724.

[4] Fothergill *v.* Phillips, *u. s.*, 779, 780.

[5] Walters *v.* Morgan, *u. s.*, 723. See *ib.* generally as to inequality.

[6] Sharp *v.* Wright, 28 Beav. 150. See also Alloway *v.* Braine, 26 *ib.* 575.

[7] Eads *v.* Williams, 4 De G. M. & G. 674, 691.

[8] Walker *v.* Jefferys, 1 Ha. 341.

[9] Pollard *v.* Clayton, 1 K. & J. 462: see also Parker *v.* Frith, 1 S. & S. 199 n.; Colby *v.* Gadsden, 34 Beav. 418; & cf. Allen *v.* Hilton, 14 Ves. 58.

[10] Walker *v.* Jefferys, *u. s.*, 349.

[11] Eads *v.* Williams, *u. s.*

[12] Huxham *v.* Llewellyn, 21 W. R. 570. It is not a sufficient explanation of a delay to say that the defendant's solicitor was suffering from mental alienation: *ib.* 766.

or even three months and thirteen days,[1] after the parties had been at arms' length, have been held to be fatal to relief. However, where the draft of a lease of a mine was submitted to the lessee in May, 1855; and the lessee went into possession, and worked until July, 1855; and afterwards from time to time tried the mine until October, 1856; and then abandoned it; and in January, 1857, proposed, that the contract should be rescinded, but did not actually repudiate it; the lessor was held not to have lost his right to enforcement by not taking proceedings until the 26th of March, 1857.[2] And where an agreement to purchase land containing a mine was entered into in October, and the purchaser was let into possession at Christmas, 1860; and the purchaser remained in possession, but did not pay his purchase-money; and in March, 1862, the vendor proposed that the agreement should be cancelled; and in May, 1862, the purchaser refused to consent thereto; the vendor was held not to have lost his right to enforcement by not taking proceedings until December, 1862.[3]

Time "of the essence" in mining contracts.

And although time may not have been originally named, it is, in contracts for mining leases, of the essence of the contract; and the lessee may, therefore, always fix a reasonable time for completion, and, on default by the lessor, may rescind the contract.[4] And where more than two months had elapsed from the date of the contract, and the lessee then fixed a month for the completion, it was held to be a reasonable time; although there were matters essential for the completion, which did not depend on the lessor, but on third parties.[5]

SECT. 5.—SPECIFIC PERFORMANCE AND DAMAGES.

(a) *Mine or Quarry.*

Specific performance may be had.

Assuming that a contract to sell or purchase, or to grant or take a lease of, a mine or quarry is not obnoxious to the

[1] Glasbrook *v.* Richardson, 23 W. R. 51.

[2] Haywood *v.* Cope, 25 Beav. 140.

[3] Colby *v.* Gadsden, 34 *ib.* 416.

[4] Macbryde *v.* Weekes, 22 Beav. 533: see Green *v.* Sevin, 13 Ch. D. 594.

[5] Macbryde *v.* Weekes, *u. s.*

Statute of Frauds,[1] and is free from ambiguity or uncertainty ;[2] and that no question either of want of title,[3] of fraud or inequality,[4] or of delay,[5] arises, the contract is, in general, capable of being specifically enforced ; and the party injured by its breach is not necessarily confined to his remedy in damages.[6] However, where one of two tenants in common of a colliery entered into a contract for a lease of the whole ; but was not guilty of any improper conduct or misrepresentation ; and did not hold himself out as capable of contracting for the whole ; it was held, that the contract could not be enforced as to his moiety only.[7]

Covenants to be inserted where contract silent.

Under an agreement for a lease of mineral property upon royalties, with stipulations as to the mode of working, the lessor is entitled to have a covenant inserted enabling him and his agents, at reasonable times and giving reasonable notice, to enter the mines for the purpose of seeing the mode of working, and inspecting and measuring the quantity got.[8] And where, under a contract for the sale and purchase of mineral property, the price is not made payable at once, but is made payable by instalments depending on the extent of the workings, the vendor has a similar right for the purpose of inspecting and measuring the quantity got.[9] Under an agreement for a lease, to contain "all usual and customary mining clauses," the lessor is entitled to have a proviso inserted for re-entry on breach of covenant to pay rent or royalty.[10] And he is apparently entitled to have provisions inserted prescribing proper modes and a proper time of working, and protecting the mine against the influx of water.[11] But he is not entitled to have a proviso inserted for re-entry on breach of any covenant or provision

[1] *Ante*, pp. 183, 184, 185.

[2] *Ante*, pp. 185, 186, 187.

[3] *Ante*, pp. 188, 189.

[4] *Ante*, pp. 192, 193, 194.

[5] *Ante*, pp. 194, 195.

[6] The principle was laid down in so old a case as Buckinghamshire *v.* Ward, cited in 3 Atk. 385.

[7] Price *v.* Griffith, 1 De G. M. & G. 80. For a case where an agreement to grant a mining lease was attempted to be shown : workings having taken place with the knowledge of the owners ; and royalties having been tendered, although not accepted ; see Trotter *v.* Maclean, 13 Ch. D. 574, 583, 584.

[8] Blakesley *v.* Whieldon, 1 Ha. 176, 181, 182. Cf. Lewis *v.* Marsh, 8 Ha. 97, 99.

[9] Blakesley *v.* Whieldon, *u. s.*, 176 : see the form of the decree at p. 183.

[10] Hodgkinson *v.* Crowe, 10 Ch. 622

[11] Walters *v.* Morgan, 3 De G. F. & J. 722 ; Hodgkinson *v.* Crowe, 19 Eq. 594.

other than for payment of rent or royalty.[1] Nor is he entitled to have a clause inserted of forfeiture on bankruptcy or insolvency; or a covenant inserted against assignment; notwithstanding that such clause or covenant may be usual in the district in question.[2] In a lease of a colliery in Derbyshire a provision, that, when the mines demised are incapable of being worked to a profit, the lessee shall be entitled to determine, is not "usual."[3] Nor is it a provision, which, in the absence of stipulation or custom, ought to be inserted in any mining lease.[4]

(β) *Easements.*[5]

Specific performance may, in general, be had of a contract to grant or take a lease of a mining easement. However, specific performance was refused of a contract to take a lease of a wayleave, and the plaintiff was left to his remedy in damages; the defendant having desired to acquire the wayleave for the purposes of a colliery which he intended to take, and having subsequently found it impossible to obtain a lease of the colliery.[6] And specific performance was refused of a contract to take a renewed lease of a wayleave; the contract having been entered into not by the plaintiff who was competent to perform it, but by his predecessor in title who was incompetent; and the plaintiff having declined to allow a clause to be inserted empowering the

Specific performance may be had.

[1] Hodgkinson *v.* Crowe, 10 Ch. 622.

[2] *Ib.* 19 Eq. 591. The district in question was North Staffordshire.

[3] Strelley *v.* Pearson, 15 Ch. D. 113.

[4] *Ib.* Cf. Ricketts *v.* Bell, 1 Dr. & Sm. 335. As to Scotch law, see Gowan *v.* Christie, L. R. 2 Sc. & D. 273. In a Scotch contract, providing for the insertion of all "clauses usual and customary," the tenant was held entitled to have a clause inserted, empowering him to remove buildings, &c., at the end of the lease, if not taken to by the landlord at a valuation: Wilson *v.* Douglas, 7 Sess. Cas. (3rd Ser.), 112. When the Court directs a reference to Chambers to settle the terms of a lease, it will, when convenient, at the same time, make a declaration as to the insertion of a particular clause with regard to which an issue has been raised in the pleadings: Strelley *v.* Pearson, *u. s.*

[5] Liberties, which should be stipulated for, where the ownership or possession of mines or quarries, and the overlying surface, is severed, will be more conveniently stated *post*, Chap. X., *c.*; Chap. XI., Sect. 3, *a.*

[6] Anon. *v.* White, 3 Swanst. 108 (n).

lessees to determine upon notice, although a similar clause was contained in the existing lease, and was usual, if not universal, in the neighbourhood.[1] A covenant by the owner of land, that he and his successors in title will always use a neighbouring railway for the carriage of minerals, does not run with the land.[2]

(γ) *Minerals.*

Specific performance may not be had.

Specific performance cannot, it seems, be, under any circumstances, obtained of a contract for the sale or purchase of minerals; as opposed to a contract for the sale or purchase of the mine or quarry which contains them.[3] Such a contract stands upon the same footing as a contract for the sale of ordinary chattels. And the mere circumstance, that the minerals in question are to be supplied, and paid for, by instalments;[4] or that they are of a particular description;[5] or that they are to be dug out of a mine in a particular locality;[6] cannot, it seems, make the breach of the contract incapable of estimation by damages. *A fortiori*, if the contract directly or indirectly involves the working of the mine or quarry, it cannot be specifically enforced.[7] If the law were otherwise, the Court would be subjected to incessant applications as to the working; and would, in effect, have thrown upon it the duty of managing and superintending the working: and this duty it invariably declines.[8] And an injunction will not be granted to restrain the breach of a contract, of which specific performance would be refused.[9] A covenant by the owner of land, that he and his suc-

[1] Ricketts *v.* Bell, 1 Dr. & Sm. 335.

[2] See Keppell *v.* Bailey, 2 M. & K. 534, 535. For a case where a mine-owner attempted to found upon a mere statement of a fact a contract to grant a wayleave, see Dicconson *v.* Talbot, 6 Ch. 32.

[3] Pollard *v.* Clayton, 1 K. & J. 462; Fothergill *v.* Rowland, 17 Eq. 132.

[4] *Ib.*, notwithstanding Taylor *v.* Neville, 3 Atk. 384.

[5] Pollard *v.* Clayton, *u. s.* See, however, Fothergill *v.* Rowland, *u. s.*, 139.

[6] Pollard *v.* Clayton, *u. s.* See, however, Fothergill *v.* Rowland, *u. s.*

[7] Pollard *v.* Clayton, *u. s.* See also Booth *v.* Pollard, 4 Y. & C. Eq. Exch. 61; and cf. Flint *v.* Brandon, 8 Ves. 159.

[8] Pollard *v.* Clayton, *u. s.*; Wheatley *v.* Westminster Brymbo Coal Co., 9 Eq. 551, 552.

[9] Pollard *v.* Clayton, *u. s.*; Fothergill *v.* Rowland, *u. s* 132.

cessors in title will always buy minerals at a neighbouring mine or quarry, does not run with the land.[1]

SECT. 6.—FRAUD—MISTAKE—DELAY[2]—RESCISSION AND COMPENSATION.

(a) *Fraud—Mistake—Delay—Rescission.*

Fraud may entitle injured party to rescind.

Fraud or misrepresentation may entitle the injured party to have a contract to sell or purchase, or to grant or take a lease of, a mine or quarry, set aside.[3] And where three persons were working a colliery in partnership; and the share of one was put up for sale by auction by the sheriff under an execution; and the two others concealed the actual condition of, and refused to allow third parties any opportunity of examining, the colliery, and thereby discouraged bidders; and then themselves became the purchasers; it was held, that the purchase could not stand.[4]

Unless he is not misled.

But a purchaser of mining property, who alleges, that its prospects had been exaggerated by the vendor, will not be entitled to any remedy, if he has had as full an opportunity as the vendor of ascertaining the real prospects.[5] And if a purchaser, choosing to judge for himself, does not avail himself of the knowledge or the means of knowledge open to him or his agents, he cannot be heard to say he was deceived; the doctrine of *caveat emptor* applying, and knowledge of his agents being as binding as his own knowledge.[6] Indeed, having regard to the speculative character of mining property, general statements as to the prospects and capabilities of a mine are entitled to less weight in support of a charge of fraud than similar state-

[1] Keppell *v.* Bailey, 2 My. & K. 534, 535, 536.

[2] As to fraud or delay as a bar to enforcement, see *ante*, pp. 192 *et seq.*

[3] See Phosphate Sewage Co. *v.* Hartmont, 5 Ch. D. 394; Erlanger *v.* New Sombrero Co., 3 App. Cas. 1218, 1260; and cases there cited.

[4] Perens *v.* Johnson, 3 Sm. & G. 419: see the decree, p. 427.

[5] Jennings *v.* Broughton, 17 Beav. 234; 5 De G. M. & G. 126. Cf. Haywood *v.* Cope, 25 Beav. 140; Higgins *v.* Samels, 2 J. & H. 460; Aberaman Ironworks *v.* Wickens, 4 Ch. 101.

[6] Attwood *v.* Small, 6 Cl. & F. 232. See this case generally as to fraud. It reversed a decree of the Exch. See the subsequent proceedings in the latter Court, nom. Small *v.* Attwood, 3 Y. & C. Exch. Eq. 105, 501.

ments might receive in the case of other kinds of property.[1]

Or delays.

And unless the injured party is prompt in asserting his rights, he will lose them. Having regard to its uncertain and speculative character, the defence of *laches* applies with peculiar force to an action seeking to set aside a sale or lease of mineral property.[2] In a suit to set aside, for fraud, a contract to purchase a leasehold colliery, under which the purchasers had gone into possession and commenced working, a receiver and manager was appointed until the hearing: the purchasers alleging that the colliery was being worked at a loss; and that it was necessary to keep it working, both to prevent forfeiture to the landlord, and to prevent its being drowned out; and offering to supply the means of working it.[3]

Receiver and manager.

Mutual mistake.

A contract to sell or purchase, or to grant or take a lease of, a mine or quarry may also be set aside as founded on mutual mistake. And a serious misconception as to quantity is probably sufficient to justify the interposition of the Court.[4] The mere existence of unknown faults is not, however, a ground for avoiding the purchase of a mine. Mines are notoriously liable to faults; and the doctrine of *caveat emptor* may therefore with especial propriety be in such a case invoked for the benefit of the vendor.[5]

(β) *Fraud—Compensation.*

Compensation in lieu of rescission.

It may sometimes be inequitable to rescind a contract, notwithstanding that the vendor may have made misrepresentations as to value. The purchaser may, for instance, have been

[1] See Jennings *v.* Broughton, 17 Beav. 234, 239, 241.

[2] Jennings *v.* Broughton, 5 De G. M. & G. 126, 139; Ernest *v.* Vivian, 33 L. J. Ch. 513; Featherstonhaugh *v.* Lee Moor Co., 1 Eq. 318, 335. See also Erlanger *v.* New Sombrero Co., 3 App. Cas. 1231, 1240, 1247, 1254, 1257, 1281. Nine months were there held by the majority of the Lords (Lord Cairns doubting) an insufficient time to bar the right. It was in the same case said by Lords Blackburn and Gordon (pp. 1282, 1285), that a company is in a more favourable position as regards the defence of laches than an individual.

[3] Gibbs *v.* David, 20 Eq. 373.

[4] See Davis *v.* Shepherd (the facts of which are stated, *ante*, p. 186), 1 Ch. 419. As to mistakes in the grants of gales in the Hundred of St. Briavels, see A.-G. *v.* Jackson, 5 Ha. 355, 366, *et seq.*

[5] See Ridgway *v.* Sneyd, Kay, 635, 636.

allowed into possession, and have expended large sums in workings. In such a case the purchaser will be entitled to compensation.[1] Where the value of stores consumed in a colliery had been understated, involving a proportionate excess in the statement of income, it was held, that the measure of compensation, to which the purchaser was entitled, was an amount bearing the same proportion to the whole purchase-money, which the excess bore to the income stated, with an addition to such amount by way of interest at £5 per cent. It was not considered possible to lay down a different principle in the case of colliery properties from that which would apply in the case of ordinary properties.[2]

[1] Powell *v.* Elliott, 10 Ch. 424. see Set. 1314, 1315.

[2] *Ib.* For the form of the decree,

CHAPTER X.

SALES, PURCHASES, ENFRANCHISEMENTS, PARTITIONS, EXCHANGES, INCLOSURES, AND INCUMBRANCES.

a. Generally.

Mines or quarries, whether open or new, lie in grant.

Of course, since the Act 8 & 9 Vict. c. 106, s. 2, open[1] mines or quarries, which are a corporeal hereditament, lie in grant.[2] And whether unopened[1] mines or quarries are to be regarded as an incorporeal or a corporeal hereditament,[3] they also, since the Act, even as the separate subject-matter of a sale, lie in grant.[4]

Conveyance of land includes, *primâ facie*, everything beneath.

Exceptions.

A conveyance of land is, *primâ facie*, a conveyance of the entire *solum* from the surface down to the centre.[5] However, where lands are purchased under the provisions of the Rail. Cl. Cons. Act, 1845,[6] or the Wat. Cl. Act,[7] the company in question

[1] As to open and new mines or quarries, see *ante*, pp. 22 *et seq.*

[2] Livery of seisin was formerly essential to their conveyance. "By a grant of mines of lead, &c., the land itself will pass, if livery of seisin be made thereof; but otherwise it seems not, and then the grantee hath by the grant a power to dig only granted to him." Shep. Touch. Prest. 96.

[3] Upon the passage cited in n. [2], Mr. Preston remarks: "In regard to mines not open at the date of the grant, this distinction (a distinction founded on principle), though no decision is found on the point, may be taken. The grantee has an incorporeal and not a corporeal hereditament; an interest which would pass by grant without livery of seisin." And Burt. Comp. has remarks to the same effect: 361. Apparently, however, unopened mines or quarries are, or are capable of being, a corporeal hereditament: see Wilkinson *v.* Proud, 11 M. & W. 35, 36; Low Moor Co. *v.* Stanley Coal Co. 34 L. T. N. S. 186 (Mellish, L. J. doubting). Either it was possible to overcome the physical difficulty of livery by cutting a communication from the surface, or a symbolical delivery on the surface was perhaps sufficient: see Wilkinson *v.* Proud, *u. s.* Cf. Keyse *v.* Powell, 2 E. & B. 140, 142; Carlyon *v.* Lovering, 1 H. & N. 799.

[4] Amphlett, B., in Low Moor Co. *v.* Stanley Coal Co. (33 L. T. N. S. 445), appears to have doubted this.

[5] Harris *v.* Ryding, 5 M. & W. 72 74; Williams *v.* Bagnall, 15 W. R. 275; Spoor *v.* Green, L. R. 9 Exch. 107.

[6] 8 & 9 Vict. c. 20, s. 77.

[7] 10 & 11 Vict. c. 17, ss. 12, 18.

are not entitled to the mines or minerals under the lands (at all events, where they are not expressly named in their notice to take[1]), unless they are expressly named in their conveyance.[2] And it need hardly be said that, where the mines and minerals are not expressly named in their notice to take, the company in question are not entitled to have them expressly named in their conveyance.[3] The provisions of the Acts apply equally to minerals worked by surface as to those worked by underground workings.[4] It has been already seen, that no compulsory enfranchisement can affect the rights of any lord in mines, minerals, or quarries unless with his express consent in writing.[5] Whenever such consent is obtained, it should be testified by expressly naming the mines in and conveying them by the deed of enfranchisement. It has also been seen, that no mines or minerals belonging to lands, which may be sold by an ecclesiastical corporation for the purpose of redeeming land tax, shall pass by the conveyance of such lands, either by express or general words.[6] Independently of the Conv. Act, 1881, mines, quarries, and minerals, if unsevered from a manor, will pass under a mere conveyance of the manor as such. But they will not do so if they have once been severed from the manor. For, once severed, they could not be reunited; as they might be to the surface.[7] And it is possible that an enfranchisement of copyholds by a conveyance excepting the minerals would operate as a severance.[8] They will, however, do so under the usual general words of the conveyance. And the minerals in a waste will pass under the general words, although their existence was neither known to nor suspected by either of the parties to the conveyance.[9] A conveyance of a manor as such made after the commencement of the Conv. Act, 1881, includes, *primâ facie*, all mines, minerals, and quarries appertaining thereto, actually or by reputation.[10]

Conv. of manor includes mines or quarries.

[1] See Errington *v.* Met. Ry. Co. 19 Ch. D. 563.

[2] *Ib.* 574.

[3] Met. Ry. Co. and Cotton's Trustees, 45 L. T. 103; Errington *v.* Met. Ry. Co. *u. s.* 560.

[4] See Mid. Ry. Co. *v.* Haunchwood, &c. Co., 20 Ch. D. 552; *ante*, p. 9.

[5] *Ante*, p. 150.

[6] *Ante*, p. 146.

[7] See Wolst. & T. Conv. Acts, 22.

[8] *Ib.*

[9] See A. G. *v.* Ewelme Hosp. 17 Beav. 366, 386.

[10] See 44 & 45 Vict. c. 41, s. 6.

Precautions to be taken in framing instruments.

Every instrument dealing with mining property as a separate subject-matter should deal with it by the description of "mines and veins," and not by the description of "mines" only, or "veins" only; having regard to the proper meanings of those words.[1] Every Crown grant of mineral property should deal with it by the description of "mines royal as well as base;" having regard to the meaning of mines in a Crown grant.[2] It has been already seen, that the word "mine;" and probably the words "vein," "seam," and "quarry;" are wide enough to include, *primâ facie*, the chamber in which the minerals are inclosed.[3] In framing instruments dealing with mining property regard should be had to these facts. And regard should also be had to the meaning of the word "mineral;"[4] and to the various meanings of the words "surface," "subsoil," "land," "close," "tenement," "hereditament," and "soil."[5]

b. Parcels.

(*a*) *Intention to include Mines or Quarries.*

Care necessary in expressing intention to include mines or quarries.

Where it is intended that mines or quarries should be dealt with, care should, of course, be taken to express the intention with clearness.

Illustrations of difficulties which may otherwise ensue—generally.

No doubt, where an Inclosure Act saves to the lord of a manor all seignories, rights, &c.; and provides that he may enjoy the same, and all rents, services, &c., courts, &c., and all mines and minerals, and all powers of getting the same, and all other rights, in as full, ample, and beneficial a manner as he could have enjoyed the same, in case the Act had not been passed; the mines and minerals and incidental rights will belong to the lord, although he previously enjoyed them in a capacity other than seignorial.[6] And, under the power given to the Land Commissioners of making, as the condition of an inclosure, any

[1] *Ante*, p. 2.
[2] *Ante*, pp. 40, 41.
[3] *Ante*, pp. 9, 10, 11.
[4] *Ante*, pp. 11 *et seq.*
[5] *Ante*, pp. 19 *et seq.*
[6] Ewart *v.* Graham, 7 H. L. C. 331, 343; affirming Graham *v.* Ewart, 1 H. & N. 550; and questioning, if not overruling, Greathead *v.* Morley, 3 M. & G. 139. As to the limited meaning, which, for other purposes, such a provision will have, see Bell *v.* Love, 10 Q. B. D. 547, 566 *et seq.*

special agreement concerning the lands to be inclosed,[1] their intention to sever mines, &c., from the soil is sufficiently manifested by such a clause as this:—That one sixteenth part in value of the lands be allotted to the lords of the manor in lieu of their right and interest in the soil of the lands exclusively of their right and interest in the mines, minerals, stone, and other substrata under the lands.[2] Where, however, an Act for inclosing wastes of a manor provided, that a certain portion should be made to the lord in lieu of his right and interest in the soil, and that the residue should be allotted to the several tenants in fee, discharged from all customary tenures; and the Act contained a saving clause, reserving to the lord all seignories incident to the manor, and all rents, fines, services, &c., and all other royalties whatsoever; and at the date of the Act there was a subsisting lease of the mines under the allotments; it was held, that the lord was not, under the Act, entitled to those mines.[3] Under the express terms of an Inclosure Act, the lord of a manor may be deprived of the ownership of the soil of the waste, while his right to the mines and minerals therein may be saved to him.[4]

Micklethwait v. Winter.

In *Micklethwait* v. *Winter*,[5] an Inclosure Act for inclosing the waste lands of a manor enacted, that certain allotments should be made to the lord for the damage he would sustain by being obliged to make compensation for digging for any coals or minerals; and that, if the lord should enter on any of the lands for the purpose of digging any coals or other minerals, he should make compensation for damage done; but it did not expressly reserve the mines or minerals to the lord. The lord was, before the Act, entitled to the soil and freehold of the common, and to the coals and minerals thereunder. It was held, that, under the Act, he was entitled to the mines and minerals.

Denison v. Holliday.

In *Denison* v. *Holliday*,[6] the owner of land, which contained coal,

[1] *Ante*, p. 154.

[2] Musgrave *v.* Forster, L. R. 6 Q. B. 590.

[3] Townley *v.* Gibson, 2 T. R. 701. See also Micklethwaite *v.* Winter, 6 Ex. 653; Brown *v.* Chadwick, 7 Ir. C. L. Rep. 108; Listowel *v.* Gibbings, 9 *ib.* 223. And cf. Pretty *v.* Solly, 26 Beav. 606; Wakefield *v.* Buccleuch, 4 Eq. 613; Buccleuch *v.* Wakefield, L. R. 4 H. L. 377: cited *ante*, pp. 21, 22.

[4] See Robinson *v.* Wray, L. R. 1 C. P. 490.

[5] 6 Exch. 644.

[6] 3 H. & N. 670.

mortgaged both land and coal. She subsequently devised the coal mines to her children, and her lands (except the mines) to trustees, upon trust to sell; and, subsequently to her will, she demised parts of the coal to two of the trustees. By a deed of conveyance by the trustees of her will and the trustees and executors of the mortgagee to a purchaser; after reciting, that the purchaser had agreed to purchase the lands, save and except the beds of coal, and that the lessees were entitled to all the coal; it was witnessed, that the trustees and executors of the mortgagee conveyed all the land, together with all houses, &c., and quarries, (omitting the word "mines,") excepting and reserving unto the lessees during a certain term (which was shorter than that granted to them by the mortgagor) all the mines and beds of coal, to have and to hold to the purchaser in fee. It was held, that the purchaser had acquired no interest in the mines of coal.[1]

Antrim *v.* Gray.

In *Antrim* v. *Gray*,[2] a grant of land had been made in 1749, which excepted all mines and minerals. In 1856, the Irish Incumbered Estates Court purported to convey the same land "subject to the covenants, clauses, and agreements, on the part of the grantee" under the previous grant. The Court had power to make a title to the whole *solum*, from the surface down to the centre, and to convey every possible interest therein. It was held, that the mines did not pass to the grantee under the conveyance of 1856.

Benfieldside Board *v.* Consett Co.

Where an Inclosure Act for inclosing commons, and setting out public highways over the land, reserved to the lord of the manor "all mines, minerals, and quarries, of what nature and kind soever, lying and being within or under the said moors or commons intended to be divided and allotted," it was doubted, whether the mines under the roads were included.[3]

[1] Affirming S. C. 1 H. & N. 631.

[2] 9 Ir. Rep. Eq. 513.

[3] Benfieldside Local Board *v.* Consett Iron Co. 3 Exch. D. 65, *per* Cleasby, B. It need hardly be said, that where a grant of land contains a proviso, that the grantee should not dig or get any coal upon the land for sale, but only such as should be burned or employed thereon, the proviso cannot constitute an exception of the coal: see Ashton *v.* Stock, 6 Ch. D. 725. For questions arising under Scotch grants, see Fleeming *v.* Howden, 6 Sess. Cas. (3rd ser.) 783; Harvie *v.* Stewart, 9 *ib.* 129; Boyd *v.* Bruce, 11 *ib.* 243; Baird *v.* Kilsyth, 6 *ib.* (4th. ser.) 116.

(β) *Boundaries.*

Care necessary in defining boundaries.

And no less care should be taken to define with clearness the limits of the mines or quarries. For this purpose existing boundaries either on the surface or underground should be made use of as far as possible ; and, in so far as they cannot be used, there should be a reference to imaginary lines. The limits should also in every case be defined by reference to a map or plan ; and this map or plan should correspond exactly with the description contained in the instrument to which it belongs.[1] The Crown, as lord of the manor of Englefield, granted "all those coal mines found, or to be found, within the commons, waste grounds, or marshes within the said lordship of Englefield" ; with a proviso that the grant should be construed strictly against the Crown. It was held, that coal which formed part of the manor, but lay under the foreshore of the estuary of the river Dee between high- and low-water marks, was included in the word "waste," and therefore passed.[2]

Meaning of 'waste.'

c. Liberties and Restrictions.

Mine owner should, whenever possible, stipulate for express liberties.

As will be hereafter seen,[3] the owner of a mine or quarry is entitled, *primâ facie,* to exercise various important liberties in respect of the overlying surface or of the surrounding subsoil, derivable from the mere position, as adjoining owners, of the owner of such mine or quarry and the owner of such surface or such subsoil. As will, however, also be seen,[4] there are various important liberties, which a mine or quarry owner is not entitled to exercise in respect of the overlying surface or the surrounding subsoil, unless he has expressly stipulated for the right to do so. And it is in every case desirable, that he should, if possible, be in a position to ascertain the whole of his rights from the instrument under which he

[1] See Brain *v.* Harris, 10 Exch. 908. See *post*, Chap. XI., Sect. 1 (β).

[2] See A. G. *v.* Hanmer, 27 L. J. Ch. 837. As to production of documents in cases as to boundaries, see Jenkins *v.* Bushby, 35 *ib.* 400 ; Ponsonby *v.* Hartley, W. N. 1883, 13, 44. As to the onus, in Scotch law, in a case of difficulty, see Hamilton *v.* Graham, 10 Sc. Law Rep. 61.

[3] See *post*, Chap. XIV., Sect. 3, *a.*

[4] See *ib.*, *b*, *c.*

Particular kinds of liberties which are desirable.

claims. In most cases the grantee of a mine or quarry upon an exception of the rest of the land, or the grantor who excepts a mine or quarry from the rest of the land, or the person who otherwise becomes or remains the owner of a mine or quarry under an instrument of severance, will find it convenient, besides stipulating for liberty of searching for, digging, getting, working, winning, and carrying away the minerals, to stipulate for liberty of entering upon the surface; of using existing, and of sinking, driving, making, erecting, setting up, and using, new, pits, shafts, adits, levels, cuttings, roads, tramways, railways, reservoirs, watercourses, basins, drains, soughs, airways, houses, buildings, boilers, furnaces, ovens, pumps, engines, and machinery; and of exercising these liberties as often as may be convenient;[1] of discharging upon the surface the water from the mine; of using the surface for the carriage of the minerals, with or without the aid of horses, waggons, tramways, or locomotive engines; of laying the minerals and rubbish upon the surface; and of exercising all these liberties without regard to whether support be thereby withdrawn from the surface, or the surface be thereby cut up, or permanently destroyed, or seriously injured. And he will often find it convenient to stipulate for liberties of using, abstracting, diverting, withdrawing support from, or fouling water; whether such water be surface or subterranean, and whether it be present naturally or artificially. Of course, however, he will hardly find it possible to obtain such liberties except upon the terms of making compensation for all damage.

Fencing pits, &c.

As will be hereafter seen,[2] if a mineral owner leaves pits or shafts unfenced, and horses or cattle belonging to the overlying surface owner are thereby injured, the mineral owner will, in general, be, *primâ facie*, liable. Express provisions as to the fencing of pits and shafts should, however, in all cases of severance of ownership be inserted. It will sometimes in such cases be proper to stipulate that the mineral owner shall fill up pits and shafts when they are no longer wanted, and shall restore the surface. And provisions should in all such cases be made

[1] See Taylor *v.* St. Helens, 6 Ch. D. 278, 281.

[2] See *post*, Chap. XIV., Sect. 3, *c* (β).

for compensating the surface owner or his tenants for damage done to the crops by the mineral operations; and for damage or inconvenience caused by smoke issuing from furnaces, if the use of furnaces is necessary or probable.[1] Compensation for damage to crops, &c.

d. Sales—Price.

Where the plaintiff granted to the defendant all the coals and mines of coal under certain lands; and the defendant covenanted to pay to the plaintiff as the price £40 for every statute acre of the coal, which should be "found" under the lands; and, until the said price should be fully paid, to pay £40 per annum by half-yearly payments, whether the whole of an acre of the coal should in any year be "gotten" or not; and the defendant did not enter into any covenant to work or get the coal; it was held, that the "finding" of coal was not a condition precedent to the plaintiff's right to recover the annual sum of £40.[2] Jowett *v.* Spencer—meaning of "found."

e. Incumbrances—Repayment—Remedies.[3]

It is always proper in mortgages of mines, having regard to the diminishing nature of the security, for the mortgagee to stipulate that the principal money advanced shall be repayable by instalments.[4] Re-payment.

In an action for foreclosure against a mining company by the holders of debenture bonds, who have a charge on all the real and personal estate, assets, plant, machinery, and effects of the company, an interim order for the appointment of a receiver and manager may be obtained.[5] A mortgagor may, in a proper Remedies.

[1] For the construction of provisions as to user of the surface or the subsoil, see *post*, Chap. XIV., Sect. 3, *a.* (β) (γ). See, as to support, *post*, Chap. XV.: as to ways, *post*, Chap. XVI.; and as to water, *post* Chap. XVII. For the form of a reservation of liberties in a partition deed, see Wolst. & T.'s Settled Land Act, pp. 136, 138, 139, 140.

[2] Jowett *v.* Spencer, 1 Exch. 647; reversing S. C. 15 M. & W. 662. "Found" was said to mean "ascertained to lie and be."

[3] As to the rights of a mortgagor and mortgagee to work, see *ante*, pp. 82 *et seq.*; the rights of the mortgagee of a partner, *ante*, p. 118; and the power of a mortgagee to sell, *ante*, p. 136. And as to the positions of a mortgagor and a mortgagee, where minerals belonging to a third party are improperly worked, see *post*, Chap. XXII., Sect. 2, *a.*

[4] Day. 2, Part 2, 433 n.

[5] Peek *v.* Trinsmaran Co., 2 Ch. D. 115; Set. 422. For the form of an

case, in a foreclosure action, be restrained from removing, disturbing, or injuring fixtures.[1]

f. Covenants for Title.

Taylor *v.* Shafto.

In *Taylor* v. *Shafto*[2] the owner of land granted a lease of the mines thereunder; and the lease contained provisions not merely enabling, but binding, the lessees so to work as to withdraw support from the surface.[3] The owner subsequently sold the surface, excepting the mines, with power to work and carry away the minerals; and the conveyance contained the usual covenant for the right to grant, free from incumbrances. Subsequently to the sale the workings of the lessees caused the surface to subside.

Dennett *v.* Atherton.

It was held, that the covenant had been infringed. However, where the owner of land containing mines works out the mines; and subsequently sells or demises the land, giving the usual covenant for quiet enjoyment; and the purchaser or lessee builds a house; and, in consequence of the workings, the house subsides; the covenant is nevertheless not infringed. Such a covenant would otherwise imply a warranty, that the land was capable of being used for any purpose, or for any purpose not expressly excluded.[4]

Spoor *v.* Green.

Spoor v. *Green*[5] involved similar questions. There the owner of land, underneath which were coal mines and fire clay, granted a lease of the seams of coal, with incidental powers over the surface in respect of those seams, and also in respect of an adjoining colliery. The seams were soon afterwards substantially worked out by the lessees. Subsequently, but during the subsistence of the lease, the owner, without fraud or concealment, sold the land;[6] and the conveyance contained the

order appointing a receiver and manager on behalf of debenture holders, without prejudice to a previous order, see Huntington *v.* Coal Ass., Set. 421, 422: see also Lloyd *v.* Lloyd Co. *ib.* 189.

[1] See Lloyd *v.* Lloyd Co., Set. 189. For the proportions in which mines and surface property, which belong to different persons, but are together subject to a rent-charge, should contribute to the payment of the charge, see Ley *v.* Ley, 6 Eq. 174.

[2] 8 B. & S. 228.

[3] See Shafto *v.* Johnson, 8 B. & S. 252, n., cited *post*, Chap. XV., Part C. Sect. 2, *c.* (β), where the lease in question was the same.

[4] See Dennett *v.* Atherton, L. R. 7 Q. B. 327.

[5] L. R. 9 Exch. 99.

[6] There was no exception of the fire-clay, which was, accordingly, included in the sale.

usual covenants for title, quiet enjoyment, and freedom from incumbrances. There had not been, subsequently to the sale, any working, or any exercise of the powers over the surface; and it did not appear, that such powers were likely to be exercised. More than 20 years after the sale, but in consequence of the workings, the surface subsided. It was held (1) that the subsistence of the lease in respect of the unwrought coal, and the unexercised powers, did not constitute a breach of the covenants; and (2) that, if it did, the breach was not a continuing breach, but had taken place once for all; and that the remedy was, therefore, barred by the Statute of Limitations.[1] And the fact, that the lessees had, subsequently to the sale, but within 20 years of action brought, entered the mines, and taken some fire-clay therefrom, was held (3) not to constitute a breach of the covenant for quiet enjoyment; the fire-clay having been included, not in the lease, but in the sale, and such taking having, therefore, been a trespass.[2] However, the fact, that the lessees had, at the time of entry, also taken some loose fragments of coal from the mines, was held (4) to constitute a breach of the covenant for quiet enjoyment.[3]

g. Stamps.

Conveyances on sales are subject to an *ad valorem* duty of 10s. per £100;[4] and the term conveyance on sale includes every instrument, and every decree or order of any Court or of any Commissioners, whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser or any other person on his behalf or by his direction.[5]

[1] *Per* Cleasby and Bramwell, BB., Kelly, C.B., dissenting.

[2] *Ib.*

[3] *Per* Kelly, C.B. In consequence of the state of the pleadings the decision upon this point was immaterial.

[4] Stamp Act, 1870, Sched.

[5] S. 70. These words are wider than those in the Act 55 Geo. 3, c. 184: "conveyance . . . . of any kind or description whatsoever upon the sale of any lands, &c., whereby the lands, &c., shall be conveyed to or vested in the purchaser, &c." An instrument subject to this Act stated, that the plaintiffs had agreed to sell to the defendants all the two upper veins or beds of coal, &c., at the price of £77 per acre, £100 to be paid on the date and the remainder by equal quarterly payments, with a provision, in case more coal should be worked than in any year should exceed £100 at the rate of £77 per acre, for the payment of the excess. It was held, that an *ad valorem* stamp was not necessary. See Phillips *v.* Morrison, 12 M. & W. 740.

CHAPTER XI.

LEASES.

Sect. 1.—PARCELS.[1]

(a) *Intention to include Mines or Quarries.*

Care necessary in expressing intention to include mines or quarries.

Where it is intended, that mines or quarries should be included in a lease, the same care should be taken, as in a sale,[2] to express the intention with clearness. In *Dugdale* v. *Robertson*[3] the owners of a surface and of underlying mines demised all mines, minerals, &c., in, upon, or under the surface; and also full and free liberty, &c., to search for, work, gain, raise and get up, stack and carry along, use, sell and dispose of, the minerals, &c.; and to open, dig, sink, drive, win, work, and make any pits, shafts, levels, cuts, canals, drains, watercourses, roads, deposits of rubbish, &c., "except in or upon any demesne lands and pleasure grounds" coloured red upon a plan attached to the lease. It was held, that the exception referred to the liberties, and not to the parcels; and that the mines and minerals under the lands coloured red were included in and passed by the demise. Where a lease of fire-clay included a lease of coal seams "workable as coal seams," it was held, that the lease of the coal was not confined to seams workable at a profit independently of the fire-clay; but that a particular seam, which was workable at a profit when both the coal and the fire-clay were taken into account, was included.[4]

[1] As to the necessity, in framing instruments, of having regard to the meanings of mining expressions, see *ante*, p. 204. It has been said, that in leases and similar documents the word "mine" is commonly used in a sense slightly wider than its primary one: see Mid. R. Co. *v.* Haunchwood, &c., Co., 20 Ch. D. 555, *per* Kay, J.; *ante*, p. 4.

[2] *Ante*, p. 204.

[3] 3 K. & J. 695.

[4] Carr *v.* Benson, 3 Ch. 524.

May be included although lessee disentitled to work.

Mines or quarries may be included in a demise, although the lessee may be disentitled to work them.[1] And where a lease contained a covenant to work mines and raise coal thereout, until the whole of such mines, or as great a quantity as by working in a diligent manner could be gotten, should be worked out, "except the ribs or pillars which must necessarily or which the lessors might require to be left," it was held, that the words in inverted commas did not prevent the lessee from having such an interest in the excepted ribs and pillars as could be submitted for compensation to a jury summoned under an Act giving compulsory purchasing powers.[2]

(β) *Boundaries.*

Care necessary in defining boundaries.

And the same care, as in a sale,[3] should be used to define with clearness the limits of the mines or quarries. In *Davis* v. *Shepherd*,[4] the facts of which have been already stated,[5] a bill filed by the second lessee against the first to restrain workings to the east of the fault was dismissed. It was held,[6] that, as the plaintiff could not have enforced the second agreement against the lessors,[7] he was not in constructive possession of the minerals in question; so as to entitle him to an injunction.[8]

Effect of difference between parcels and plan.

Where the description in the instrument is ambiguous, and a plan exists, the plan may sometimes be referred to for the purpose of clearing up the ambiguity. Thus, in *Lyle* v. *Richards*,[9] the southern boundary of a mine was described in a lease as "a straight line" of about 355 fathoms from John Vincent's house at the south-west extremity of the sett to a bound-stone at the north-west extremity of South Wheal Basset Sett; and the question raised was, whether the line was to be drawn from the north-east, or the south-east corner of the house. A plan existed, and the line appeared thereon to be drawn from the north-east corner. It was held, that the plan might be referred

[1] Dugdale *v.* Robertson, 3 K. & J. 695.

[2] Swindell *v.* Birmingham Canal Navigation, 9 C. B. N. S. 241.

[3] *Ante*, p. 207.

[4] 1 Ch. 410.

[5] *Ante*, p. 186.

[6] Reversing S. C. 12 L. T. N. S. 538.

[7] See *ante*, p. 186.

[8] As to such constructive possession, see *ante*, p. 41.

[9] L. R. 1 H. L. 222.

to for the purpose of ascertaining the real boundary.[1] Of course, however, it is impossible to delineate on a map or plan with absolute accuracy in all minute particulars the limits of mines or quarries. Accordingly, where a variance exists, or is said to exist, between the limits as described in the instrument in question, and as delineated on a map or plan, the limits will be ascertained as far as possible by reference to the words of description in the instrument, and without reference to the map or plan.[2]

Admissibility of evidence as to use of language amongst miners.

Sometimes evidence will be admitted to show the understanding amongst miners as to the particular language employed. Thus, in *Clayton* v. *Gregson*,[3] lessees had covenanted, that they would, by a certain time, get all the coal "not deeper than or below the level of" the bottom of the A. mine under a certain point at the surface. It was held, that evidence was admissible to show, whether, according to the understanding of miners, the expressions used referred to a perpendicular depth below the surface, or to the inclination of the strata and the power of drainage.[4]

SECT. 2.—RENT AND ROYALTY.

a. Mine or Quarry.

(a) *Generally.*

Desirability of reserving both dead rent and royalty.

The lessor of a mine or quarry should always stipulate for a combination in the *reddendum* of fixed or dead rent, and of royalty. He will, by this means, ensure the receipt, on the one

[1] *Per* Lords Cranworth and Chelmsford, Lord Westbury dissenting. The plan was in itself slightly inaccurate, but this was held by the majority of the Lords to be immaterial.

[2] Taylor *v.* Parry, 1 Scott N. R. 576. Cf. Brain *v.* Harris, 10 Exch. 908; Thomas *v.* Atherton, 10 Ch. D. 200, 201.

[3] 5 A. & E. 302.

[4] It was referred to an arbitrator to receive evidence, and state a case; and he found, that, according to the understanding of miners throughout the district in which the mine was situate, the expressions had reference to the inclination of the strata and the power of drainage. It was held, that judgment could not be given on the footing of the finding; some of the parties to the lease having been named as residing outside the district; and a new trial was ordered. Cf. Brain *v.* Harris, *u. s.*

hand, of a yearly sum of a specified amount, however unproductive the demised property may prove; and, on the other hand, of a sum proportionate to its productiveness, if it prove productive. In some leases the dead rent and the royalty are made payable cumulatively. Others provide, that a deduction out of the dead rent may be made of the royalty actually paid.

(β) *Dead Rent*

Dead rent when reserved usually payable under all circumstances.

Where a dead rent is reserved, it is payable, *primâ facie*, although the demised property be never actually worked:[1] or, although it prove not to be worth the expense of working; whether, generally, on account of the speculative character of such property;[2] or, specifically, on account of accidents,[3] or even of unknown faults. Mines are notoriously liable to faults; and the doctrine of *caveat emptor* may therefore, in the latter case, be with peculiar propriety applied for the benefit of the lessor.[4] And it is, *primâ facie*, payable, where the demised property is not worth the expense of working, although the lessee may have been authorized to deduct the royalty out of it;[5] or even to determine the lease on the minerals being worked out.[6] And the mere fact, that the rent is not in terms reserved, "whether the minerals be worked or not," is immaterial.[7] And the lessee cannot, of course, escape payment by offering to pay the royalty for all the minerals, or all the remaining minerals.[8] The rent is also payable, *primâ facie*, after the exhaustion of the demised property.[9] And a dead rent is payable, *primâ facie*, even although the mine supposed to be

Even where mine a nonentity unless where mutual mistake.

[1] Jones *v.* Reynolds, 7 C. & P. 335; Jegon *v.* Vivian, L. R. 1 C. P. 34; 6 Ch. 757.

[2] Haywood *v.* Cope, 25 Beav. 140; Strelley *v.* Pearson, 15 Ch. D. 113, 119. Cf. the Scotch law as to unworkability to profit, as illustrated in Gowan *v.* Christie, L. R. 2 Sc. & D. 273.

[3] Phillips *v.* Jones, 9 Sim. 519; Mellers *v.* Devonshire, 16 Beav. 252.

[4] Ridgway *v.* Sneyd, Kay, 627, 635. See also Mellers *v.* Devonshire, *u. s.* 256, 258; Jervis *v.* Tomkinson, 1 H. & N. 208.

[5] Ridgway *v.* Sneyd, *u. s.* 636.

[6] Phillips *v.* Jones, *u. s.* 519.

[7] Ridgway *v.* Sneyd, *u. s.* 627.

[8] Phillips *v.* Jones, *u. s.*; Mellers *v.* Devonshire, *u. s.* 255.

[9] R. *v.* Bedworth, 8 East, 387; Bute *v.* Thompson, 13 M. & W. 487; Milne *v.* Taylor, 16 L. T. 172; Jegon *v.* Vivian, L. R. 1 C. P. 34; Clifford *v.* Watts, 5 *ib.*, 587, 588.

demised prove to be a nonentity, if the bargain between the parties is, in substance, that the lessee shall take his chance of finding the minerals. For in such a case a warranty by the lessor, that the mine exists, will not be implied.[1] It has, however, been said, that, if, in consequence of former and unknown workings, the minerals supposed to have been demised had all been previously gotten, the payment could probably not be exacted; the doctrine of mutual mistake being, in such a case, probably applicable for the relief of the lessee.[2] Where a lessee had covenanted to pay a dead rent commencing on the first quarter-day after a specified quantity of coal had been dug, he was not allowed to escape the payment by fraudulently abstaining from completing the digging of that quantity.[3]

Fraud to evade payment.

Where a dead rent is not reserved, the lessor cannot rely, as a safe substitute, upon a covenant by the lessee to work in a workmanlike manner:[4] or even upon covenants to take the usual steps forthwith to win the minerals; or to work diligently and regularly; or to get a specified quantity of minerals in each year of the demise. For, where a lessee had covenanted to proceed forthwith to sink pits "as far as could and ought to be accomplished by persons acquainted with the nature of collieries, and as in such cases was usual and customary;" and he ascertained, upon trial, that there were, in fact, no coals, or none worth the expense of getting; it was held, that he was not

Covenants as to working are unsafe substitute.

[1] Jefferys *v.* Fairs, 4 Ch. D. 448; where, however, evidence was given to show, that the search was insufficient. See also Jervis *v.* Tomkinson, 1 H. & N. 208. In Scotch law a lessee is entitled to abandon a mining lease, when the mine turns out to be a nonentity, or there is a total destruction or exhaustion of it: Gowan *v.* Christie, L. R. 2 Sc. & D. 273. The Civil law doctrine, upon which the Scotch law is founded, was the same.

[2] Ridgway *v.* Sneyd, Kay, 627, 635.

[3] Green *v.* Sparrow, 3 Swanst. 408 n. For a decision, under a Scotch lease, as to the non-liability to payment until the lessor had performed a covenant on his part to make a road, see Guthrie *v.* Sheares, 1 Sess. Cas. (4th ser.) 181. A covenant (Scotland) to portion a daughter upon the father's death in a sum equal to 3 years' rental of an estate containing minerals was held to mean an average of the rental for the 3 years preceding the death; a new lease at a greatly increased rent having been granted within the 3 years: Douglas *v.* Scott, 8 *ib.* (3rd ser.) 360; following Wellwood *v.* W., 11 D. 248. See also Allan's Trustees *v.* Hamilton, 5 *ib.* (4th ser.) 510; and cf. Sibright *v.* Straiton Co., 6 *ib.* 1208.

[4] Jegon *v.* Vivian, 6 Ch. 757, 758.

bound to sink the pits.[1] And, if, where a lessee has covenanted to work fairly and regularly, or diligently and regularly, faults are found or unavoidable and insuperable[2] accidents happen, whereby it is impossible to work except at a ruinous expense; although the lessee will not be allowed to plead the faults or accidents as an absolute bar to all relief against him on his covenant;[3] the lessor will not, on the other hand, be allowed to enforce the covenant, if the lessee offers to pay the royalty on all the minerals capable of being worked.[4] And, if, where a lessee has covenanted to get a specified quantity in each year, it turns out that there never was in the mine the quantity specified, the covenant cannot be enforced.[5]

Lessee should stipulate for deductions.

The lessee should, if possible, stipulate that, in computing the amount of rent, deductions should be made in respect of minerals which should be found unworkable or unsaleable, and in respect of faults; and that deductions should also be made in the event of the working being prevented or suspended by fire, water, or other insuperable accident.[6]

And for average clause.

The lessee should also, if possible, stipulate for the insertion in the lease of an "average clause;" whereby, in the event of his failing in any year of the demise to raise a sufficient quantity of minerals to compensate him for the payment of the dead rent, he may be entitled to make up the deficiency in any subsequent year, without being obliged to pay royalty in respect thereof. Where it is intended to insert an average clause, unless the intention is clearly expressed, difficulties may arise. Thus, in *Bishop* v. *Goodwin*,[7] where a royalty was made payable quarterly, it was provided, that, in case, at the end of the first quarter of any year the royalty should not equal £38 10*s*., the lessees

[1] Hanson *v.* Boothman, 13 East, 22.

[2] An issue will, if necessary, be directed to ascertain, whether the accident is unavoidable and insuperable: see Walker *v.* Jefferys, 1 Ha. 352.

[3] Morris *v.* Smith, 3 Dougl. 279.

[4] Smith *v.* Morris, 2 B. C. C. 311 (for the form of the decree in which see p. 314); Phillips *v.* Jones, 9 Sim. 519; Walker *v.* Jefferys, *u. s.*; Mellers *v.* Devonshire, 16 Beav. 258; Ridgway *v.* Sneyd, Kay, 632, 633, 634, 637. If the lessor can get everything he has contracted for, he will not, in addition, be allowed to compel the lessee to be at an expense which will benefit no one: Ridgway *v.* Sneyd, *u. s.*, 635, *per* Wood, V.-C.

[5] Clifford *v.* Watts, L. R. 5 C. P. 577.

[6] See, as to accidents, Simpson *v.* Ingleby, 20 W. R. 587, 993.

[7] 11 M. & W. 260.

should thereupon pay the deficiency; and that, in case, at the end of the second quarter, the royalties for that and the preceding quarter should not equal £75, the lessees should thereupon pay the deficiency; and so on with respect to the third and fourth quarters; it being the intention of the parties, that the royalties should always amount to "£150 per annum at the least." It was held, that, in calculating the amount due at the end of each year, the lessees were not entitled to set off the excess of royalty accruing in any quarter against a deficiency in the previous quarter; but that the lessor was entitled, at the end of each quarter, to the full sum of £38 10*s*.[1]

(γ) *Royalty*.[2]

Lessor should stipulate for covenants as to working; so as to secure maximum royalty.

Proper provisions should be inserted to secure the payment of as large a royalty as possible. The lessee should, for instance, be required to covenant that he shall continuously work;[3] and such covenant should be explicit in its terms. It will not be implied from the mere fact, that the parties to such a lease could have had no other intention than that the property should be worked;[4] or that a royalty has been reserved;[5] or that the lessee has covenanted to work in a "proper and workmanlike" manner.[6] Indeed, in a case, where a rent and a royalty were reserved; and the lessee covenanted to work in a "workmanlike manner" all mines "which then had been, or thereafter during the continuance of the demise should be, discovered or

[1] In Clayton *v.* Penson, W. N. 1878, p. 158, a difficulty arose on an average clause through the use of the words "actually worked and brought up." A lessee sometimes stipulates, that, until a specified time elapses, he shall not be charged with dead rent: see Lewis *v.* Fothergill, 5 Ch. 103. A lessee also frequently stipulates for liberty to surrender his lease in certain contingencies: see, as to this, *infra*, Sect. 6, *b*.

[2] As to the advisability of reserving a royalty, as well as a dead rent, see *ante*, p. 214.

[3] Jegon *v.* Vivian, 6 Ch. 757. Cf. Walker *v.* Jeffreys, 1 Ha. 341, 351.

[4] Jegon *v.* Vivian, *u. s.*

[5] See Crang *v.* Adams, 5 B. P. C. 588; Wheatley *v.* Westminster Brymbo Coal Co., 9 Eq. 538, 539; Jegon *v.* Vivian, *u. s.*, 742, 746. The two latter cases must apparently be taken to overrule Sharp *v.* Wright, 28 Beav. 150; where the reservation of a royalty, payable quarterly, was held to imply a covenant to commence working immediately, and to proceed continuously.

[6] Jegon *v.* Vivian, *u. s.*, 757. Cf. Mellers *v.* Devonshire, 16 Beav. 257.

opened;" and an action was brought upon the covenant; and the lessee pleaded, that, before the demise, the mines had never been worked, and that, during the demise, he had never in fact worked them; it was held, that he had not infringed the covenant.[1] And where a lessee covenanted to pay a dead rent, and to continue to work so long as the mine was "fairly workable," it was held, that he was not obliged to continue to work when he could no longer work at a profit.[2] Acquiescence by a lessor in the breach of a covenant to work continuously may not disentitle him to bring an action for ejectment.[3] But it may oblige him, before doing so, to give the lessee a reasonable time for restoring the plant and machinery on the mine to a working condition.[4]

Acquiescence by lessor in breach.

A covenant to "win" a mineral means, *primâ facie*, to reach it, and put it in such a condition, that it may be continuously worked in the ordinary way.[5] "A coal-field is won when full practicable available access is given to the coal hewers."[6] A covenant to "raise" means, *primâ facie*, to get or win; not to bring to the surface.[7] A covenant to work china clay in the most proper and effectual manner with a reasonable number of able-bodied men kept employed on the works at all reasonable and usual working times; and so that the china clay may be "raised, washed, and made merchantable as speedily as practicable;" has been held to be infringed by omitting for several weeks to employ the men in the raising, although during the whole of such time they were employed in the washing and making merchantable.[8]

Meaning of "win."

Meaning of "raise."

The lessor should not, however, exclusively rely upon a

Lessor should

[1] Quarrington *v.* Arthur, 10 M. & W. 335.

[2] Jones *v.* Shears, 7 C. & P. 346; S. C. 4 A. & E. 832. See, however, Cartwright *v.* Forman, 7 B. & S. 247.

[3] Whitehead *v.* Bennett, 9 W. R. 626, where there had been an acquiescence for fifteen years.

[4] Whitehead *v.* Bennett. *u. s.* See further, as to covenants to work, *infra*, Sect. 3, *b*.

[5] Lewis *v.* Fothergill, 5 Ch. 106, 111.

[6] Rokeby *v.* Elliot, 13 Ch. D. 279, *per* James, Baggallay, and Thesiger, L.JJ.: see also S. C. 9 *ib.* 639, *per* Fry, J. See further, on this point, *infra*, pp. 222, 223.

[7] Senhouse *v.* Harris, 5 L. T. N. S. 635; Kinsman *v.* Jackson, 42 *ib.* 80.

[8] Kinsman *v.* Jackson, *u. s.*, 80. 558. As to the meanings of "found" and "gotten," see Jowett *v.* Spencer, 1 Exch. 647; *ante*, p. 209. In s. 54 of 5 & 6 Will. 4, c. 50 (Highw.),

also stipulate for covenant to produce specified quantity.

covenant to work continuously; or to work uninterruptedly, efficiently, and regularly. It is, no doubt, the law, that, if a dead rent has been reserved by a lease in addition to a royalty, and the lessee has covenanted to work constantly and effectually; and, after an interval, he discontinues the working altogether; he may be made liable on the covenant, although he pays the dead rent.[1] But difficulties may easily arise in determining the precise amount of working, which will satisfy such a covenant.[2] The lessor should, in addition to a covenant to work continuously, require the lessee to covenant to produce a specified quantity of minerals at or within specified intervals.[3] If a lessee enters into a covenant to produce a specified quantity of minerals, whether they exist in the mine or not; or to pay the stipulated royalty as if they had existed; he will not, although there never was that quantity in the mine, be allowed to allege impossibility of performance at the time of entering into the covenant; whether occasioned by the act of a third party, or by the act of God, or otherwise.[4] If, how-

"getting" refers only to "winning," and does not include "carrying away": Ramsden *v.* Yeates, 6 Q. B. D. 583, 585; *ante*, p. 106. As to provisions respecting the sinking of pits and shafts, see *infra*, Sect. 3. *c.* (γ).

[1] See Whitehead *v.* Bennett, 9 W. R. 628, *per* Kindersley, V.C.; Simpson *v.* Ingleby, 20 W. R. 993, *per* James and Mellish, L.JJ.; Kinsman *v.* Jackson, 42 L. T. 80, *per* Jessel, M.R.; affirmed, *ib.* 558. See also Quarrington *v.* Arthur, 10 M. & W. 335; Jervis *v.* Tomkinson, 1 H. & N. 195. Cf. Newton *v.* Nock, 43 L. T. 197. There a covenant in a brick lease to "get the demised clay to the fullest practicable extent, consistent with the means of sale of bricks and tiles to be made therefrom," was held not to bind the lessee to go on working; the evidence showing, that profitable brickmaking at the royalty in question had become impossible. In Wheatley *v.* Westminster Brymbo Coal Co., 9 Eq. 538, 550, 551, 553; and Simpson *v.* Ingleby, 20 W. R. 588; Malins, V.C., expressed his opinion, that a lessee could not, under the circumstances mentioned in the text, be made liable; and that such a covenant as is there mentioned only obliged him, in the event of his working, to work constantly and effectually; but did not oblige him to work at all, if he did not choose to do so. His Lordship did not, however, in Wheatley *v.* Westminster Brymbo Coal Co., decide the point; but only held, that, if there was a liability, it could not be enforced in equity.

[2] See Wheatley *v.* Westminster Brymbo Coal Co., *u. s.*

[3] See Jegon *v.* Vivian, 6 Ch. 757.

[4] Jervis *v.* Tomkinson, *u. s.*, 195; Clifford *v.* Watts, L. R. 5 C. P. 577, 583, 586. In neither of these cases had a dead rent been reserved. And he will not, of course, be allowed to escape performance on the ground, that the minerals are difficult to get: Jervis *v.* Tomkinson, *u. s.*

ever, he, in fact, only covenants to raise such minerals as it is possible to find under the land in question at the specified rate of payment, he will not be bound by the covenant, unless the specified quantity existed in the mine at the time of the demise.[1] But, in such a case, the burthen lies upon him of showing, that he searched for the minerals; and searched so effectually, that they must have been found, if they had existed.[2]

(δ) *Other Renders.*

"Footage" rent.

Sometimes, instead of a royalty being reserved proportionate to the amount of minerals raised, a "footage" rent of a specified yearly amount is reserved for every foot thick per acre, and so in proportion for every greater or less thickness, which may be gotten in any year of the demise. Sometimes, also, instead of an ordinary royalty being reserved, the delivery to the lessor of a proportionate part of the mineral itself is provided for. It must be remembered, however, that whenever the subject-matter of a lease is a mine other than a coal mine, and the rent or royalty is, or may at the option of the lessor be, wholly received in kind, the lessor is, in respect of it, rateable to the poor, and to local rates, as being in receipt of a portion of the mine; and the lessee is exempt.[3] Sometimes the lessee covenants to deliver as many coals at the pit's mouth to the lessor as he may require for his personal use. In *Cartwright* v. *Forman*[4] a lease, of which there

Delivery in specie or for personal use.

[1] Clifford *v.* Watts, L. R. 5 C. P. 577. It need hardly be said, that, where a lessee covenants to produce a specified quantity of minerals in a specified time, and to pay royalties thereon; or, in the alternative, to pay a specified sum by way of rent; and he pays the rent; nominal damages only can be recovered against him for breach of the covenant to work: Foley *v.* Addenbrooke, 13 M. & W. 174.

[2] Clifford *v.* Watts, *u. s.*, 585, 588.

[3] See R. *v.* Baptist Mill Co., 1 M. & S. 612; R. *v.* St. Austell, 5 B. & Al. 693; R. *v.* Todd, 12 A. & E. 816: see also *post*, Chap. XXIII., Sect. 4, *c.* It was formerly a common practice to reserve a royalty in respect of all sums which the mineral would sell for at the pit's mouth. In Clifton *v.* Walmesley (5 T. R. 564), the lessee under a lease containing such a reservation was held at law not liable to pay any royalty in respect of sales of the minerals elsewhere than at the pit's mouth; and evidence of his having already accounted with the lessor for payments elsewhere was not admitted to explain the intention of the parties. See also Gerrard *v.* Clifton, 7 T. R. 676.

[4] 7 B. & S. 243. The decision would have been different, if no coal had remained in the mine, *ib.* Cf., as to dead rent, *ante*, pp. 215, 216.

were nine years to run, contained such a covenant. A royalty of one-eighth of the coals was also reserved by the lease; and it contained a proviso enabling the lessee, in the event of the minerals being worked out before the end of the term, to determine on giving 12 months' notice. It appeared, that some coal still remained in the mine; but that all the coal, which could be worked at a profit, had been worked out. It was held, that the lessee was liable on the covenant. Where a lessee of limestone land covenanted, that he would at all times and seasons of burning lime supply the lessor and his tenants with lime at a stipulated price for the improvement of their lands and repair of their houses, it was held, that he had impliedly covenanted to burn lime at all such seasons.[1]

Edwards *v.* Rees.

In *Edwards* v. *Rees*[2] a lessee covenanted to pay as rent "one-third part of the money that should arise, be made, received, or produced from the sale of the coals;" and also covenanted to keep "true accounts of all coal daily raised, and to make and deliver true copies thereof to" the lessor. It was held, that, taking the two covenants together, the rent was to be calculated on the amount of coals sold, and not on the amount of money actually received. In *Rokeby* v. *Elliot*[3] a licensee was empowered by a deed of grant and license to win and work all and every or any of the seams of coal under certain lands; and out of the profits to arise by the sale of the coals to reimburse himself all expenses of the winning; and, after full payment of such expenses, he became bound to pay a royalty to the licensor according to the periodical awards of arbitrators. There were three seams of coal under the lands. The licensee reached one of them by a driftway from an adjoining colliery, and worked the coal; and he afterwards partially used the driftway for the purposes of the adjoining colliery. The coal was alleged to be of an inferior quality to that in the adjoining colliery; but the licensee mingled it with that in the adjoining colliery, and sold them together. The licensee afterwards by similar means reached and worked another of the seams. It was held (1) that the coal of the first seam was won on the day when it could be first worked through the driftway, and that

Rokeby *v.* Elliot.

[1] Shrewsbury *v.* Gould, 2 B. & Al. 487.

[2] 7 C. & P. 340.

[3] 9 Ch. D. 685; 13 Ch. D. 277.

no expenses (however large) subsequently incurred could be included in the expenses of winning it; (2) that, notwithstanding the nature of its user, the expense of the driftway should be allowed as expenses of such winning; (3) that interest at £5 per cent. should be allowed on the sums expended in such winning; (4) that, in estimating the profits out of which the expenses of such winning were to be reimbursed, all the expenses of working and selling the coal, including interest on capital expended, bad debts, and wear and tear of machinery, should be allowed; and (5) that the doctrine of confusion applied, and that the coal must be taken to have been of the same value ton per ton as that which had been sold. And, on appeal to the House of Lords (*Elliot* v. *Rokeby* [1]), it was held (6) that the whole colliery was not won when the first seam was won; that the license was to be read *separatim* as to the winning of each seam; and that the licensee was entitled to reimburse himself the expenses of winning the second seam before any royalty was payable as to that seam. Elliot *v.* Rokeby.

b. Liberties.

Besides the *reddendum* in respect of the mine or quarry demised, the lessor should stipulate for the payment of rent in respect of any liberties, which may be granted to the lessee. A rent should, for instance, be reserved for each acre, and so in proportion for any less quantity, of the surface, which may be entered on and occupied by the lessee. So a rent should frequently be reserved for each acre, which may be broken up or injured by the lessee, and may not be restored by him before the end of the demise. And if in such a case a penal rent is agreed upon, care should, in framing the reservation, be taken to ensure its being treated as liquidated damages, and not as a penalty.[2] In like manner rents should be reserved in respect of wayleaves, airleaves, and waterleaves, if wayleaves, airleaves, and waterleaves are included in the lease. So rents should be reserved for the right to carry, whether by way of out- Rent in respect of liberties.

[1] 7 App. Cas. 43; reversing, on this point, Rokeby *v.* Elliot, 13 Ch. D. 277: which affirmed S. C. 9 Ch. D. 685.

[2] See *Re* Mexborough & Wood, 47 L. T. 516.

stroke [1] or otherwise, through, over, under, or upon the demised property, minerals gotten in other mines; and for the rights to ventilate and drain other mines through the demised property; and (if it be intended that the lessee shall not enjoy the right without paying for it) for the right to work the demised mine by instroke.[2]

G. W. R. Co. *v.* Rous.

The words "through, over, or under," used in a reservation of wayleave royalty for the carriage of foreign minerals, were the subject of decision in *Great Western Railway Co.* v. *Rous*.[3] The company in that case agreed to take an assignment of a portion of the demised land; and erected a siding thereon; and used such siding for the temporary shunting of trains, until they could safely and conveniently forward them to their destination. Many of such trains contained foreign minerals. It was contended, that, of the words "through, over, or under," "through" was the governing word; and that the reservation could not have been intended to apply to minerals, which were brought on the demised land for a temporary purpose, and then removed; but only to minerals, which traversed the land in the sense of entering at one end, and going out at the other. It was, however, held, that, in respect of the minerals in question, the royalty was payable.

Senhouse *v.* Harris.

In *Senhouse* v. *Harris*,[4] a difficulty arose upon a reservation of outstroke royalty. There the defendant was the lessee of mine A. (which was not owned by the plaintiff); and was the grantee under the plaintiff of the right of carrying coals from that mine along a tramway of the plaintiff on payment of $2\frac{1}{2}d.$ per ton carried. The defendant took a lease of B., an adjoining mine, from the plaintiff; and thereby obtained liberty to bring the coal got in A. to the surface by way of outstroke through B. on payment of $1\frac{1}{2}d.$ per ton for outstroke rent. It was held, that $2\frac{1}{2}d.$ per ton was payable in respect of the produce of A. conveyed along the tramway, although such produce was brought to the surface through B.[5]

[1] See *infra*, Sect. 4 (*a*).

[2] See *infra*, Sect. 3, *c*, (*β*).

[3] L. R. 4 H. L. 650.

[4] 5 L. T. N. S. 635.

[5] The lease also provided, that no rent was to be paid for any coal got from B., "which should be used or consumed on or for any engine employed in working or carrying on the mines demised." The engine of B. was used in keeping B. free from water, but was at the same time also

c. Measurements, Accounts, Plans, Inspection, &c.

Lessor should stipulate for covenants as to measurements, accounts, plans, inspection, &c.

As ancillary to the covenants to pay royalty or footage rent; or to pay wayleave, airleave, or waterleave rent; or to pay rent for the rights of instroke,[1] outstroke,[2] ventilation, or drainage; the lessor should stipulate for the insertion of covenants by the lessee to value and measure or weigh the minerals in question; and to apprize the lessor of the times of so doing; and to keep proper accounts, and also proper plans, of the workings; and to allow the lessor to have access to the mine and to the measuring or weighing machines; and to produce the accounts and plans for the inspection of the lessor, and to allow him to take copies thereof.[3] The provisions of the Act 44 & 45 Vict. c. 41, s. 14, restricting the right of forfeiture for breaches of covenants in leases, are not available in the case of a covenant to allow the lessor to have access to or inspect books, accounts, records, weighing machines, or other things, or to enter or inspect the mine or the workings thereof.[4] Where a shaft leading to the mine is itself within the demised property, the lessor is, in the absence of stipulation, entitled to go down the shaft and inspect the mine.[5]

d. Remedies for Non-Payment.

Distress.

Independently of any provision to that effect, a distress will lie on non-payment of a dead rent: or even on non-payment of a royalty, or a footage rent; the maxim, *id certum est, quod*

used for bringing up the coal in A. Upon this it was held, that no rent was payable in respect of the engine, because (1) it would be difficult to determine how much of the steam power was appropriated to the purposes of B.; and (2), the amount might be considered to have been paid for in the outstroke rent. See Hodgkinson *v.* Crowe, 10 Ch. 622 (p. 623), for another case in which a question arose as to the liability to payment for the mere user of coal.

[1] See *infra*, Sect. 3 *c* (β).

[2] See *infra*, Sect. 4 (α).

[3] Even before the Jud. Acts settled accounts might sometimes have been re-opened for error at law: see Perry *v.* Attwood, 6 E. & B. 691. As to the effect which a covenant to keep accounts and deliver copies will sometimes have, see Edwards *v.* Rees, 7 C. & P. 340, *ante*, p. 222. For an injunction to restrain the removal of ore until it was measured, see Wright *v.* Pitt, 12 Eq. 408, 417.

[4] See the section.

[5] See Lewis *v.* Marsh, 8 Ha. 97, 99.

certum reddi potest, being in the latter cases applicable.[1] A power in a mining lease of distraining upon lands; "in which there shall be for the time being any pits or openings, by or through which the" demised coal "shall for the time being be in course of working by the lessees, their executors, administrators, and assigns;" probably does not run with lands owned by the lessees at the time of the demise, and through which the mines were worked: but it is binding as against assignees with notice.[2]

Action on covenant.

Action for account.

Besides the remedy of distress a lessor may, of course, have a remedy on the covenants to pay. And a lessor was always entitled, even before the Jud. Acts, to a remedy in equity for an account. And this was irrespective of whether he was also entitled to an injunction: mining operations having always been regarded as a species of trade;[3] and the rule, "no injunction, no account," having, therefore, been deemed inapplicable.[4]

Interest.

In a successful action to recover rents and royalties interest at £4 per cent. is also recoverable from the date of the writ.[5]

Sect. 3.—Working.

a. Right to Work.

Express right to work should be given to lessee.

Every mining lease should give the lessee liberty to search for, dig, get, work, win, and carry away the minerals in question. No doubt there is a clear distinction between a lease of lands, which happen to contain mines or quarries; and a lease, which embraces no other property than mines or quarries. In the

[1] Daniel *v.* Gracie, 6 Q. B. 145; R. *v.* Westbrook, 10 *ib.* 205; Edmonds *v.* Eastwood, 2 H. & N. 826.

[2] Daniel *v.* Stepney, L. R. 9 Exch. 185; reversing S. C., 7 *ib.* 327. A mining lease, giving a power of distress by way of security for a debt, and reserving a rent as a mode of providing for the payment of interest, is not a bill of sale within the meaning of the Bills of Sale Act, 1878: see s. 6.

[3] Jesus Coll. *v.* Bloome, Amb. 55. 56; 3 Atk. 262, 264; Pulteney *v.* Warren, 6 Ves. 73, 89; Jefferys *v.* Smith, 1 J. & W. 302; Parrott *v.* Palmer, 3 M. & K. 632. 640, 642: see also *ante*, p. 57 n.[2], and other cases there cited.

[4] Jesus Coll. *v.* Bloome, *u. s.*; Pulteney *v.* Warren, *u. s.*; Parrott *v.* Palmer, *u. s.*; Ernest *v.* Vivian, 33 L. J. Ch. 517, 519; Wright *v.* Pitt, 12 Eq. 416. See, however, Geast *v.* Barker, 2 B. C. C. 61.

[5] Newton *v.* Nock, 43 L. T. N. S. 197; under the Act 3 & 4 Will. 4. c. 42, s. 28. For provisions for re-entry on non-payment, see *infra*, Sect. 6, *a*.

former case, if the mines or quarries are new,[1] the lessee is, *primâ facie*, disentitled to work.[2] In the latter case, although they are new,[1] he is, *primâ facie*, entitled to work.[3] However, even in the latter case, his rights seem doubtful, if the mines or quarries are convertible to any other use than that of being worked.[4] And if the lease embraces both open[1] and new[1] mines or quarries, he is not, in the absence of express liberty, entitled to work the new mines or quarries.[5] And the terms in which the liberty is given should be free from ambiguity. In *Dugdale* v. *Robertson*,[6] the facts of which have been already sufficiently stated,[7] it was held, that the exception referred not merely to the liberty to "open, dig, sink, drive, win, work, and make;" but also to the liberty to "search for, work, gain, raise, and get up, stack and carry along, use, sell and dispose of;" so that, although the mines and minerals under the lands coloured red were included in the lease, the lessees were held not entitled to work them.[8]

And in unambiguous terms.

As in the case of a grant in fee simple,[9] so in the case of a lease for years, whatever liberties in respect of the overlying surface or the surrounding subsoil are desirable for the purpose of working the mine or quarry in question should be the subject of express stipulation and grant. The lessee will usually find it convenient to stipulate for liberties similar to those already mentioned in the case of grants in fee simple.[10] The lessee of a quarry, who has covenanted not to commit waste by cutting trees, does not infringe his covenant by cutting trees excepted from the lease, and which it is necessary to remove in order to work the quarry.[11] A brick lessee, who has covenanted not to take or use more of the surface than should be necessary, nor to do any act by reason whereof the demised land should be

Incidental liberties.

[1] As to open and new mines or quarries, see *ante*, pp. 22 *et seq.*

[2] See *ante*, pp. 51, 52.

[3] See *ante*, p. 53: see also Coppinger *v.* Gubbins, 3 J. & L. 410.

[4] See Coppinger *v.* Gubbins, *u. s.*

[5] See *ante*, p. 53.

[6] 3 K. & J. 695.

[7] *Ante*, p. 212.

[8] Cf. Attersoll *v.* Stevens, 1 Taunt. 183, 200. As to the effect of a covenant by lessees to work "except the ribs or pillars which must necessarily or which the lessors might require to be left," see Swindell *v.* Birmingham Canal Co., 9 C. B. N. S. 241, *ante*, p. 213.

[9] *Ante*, p. 207.

[10] *Ante*, pp. 207, 208.

[11] Doe *v.* Price, 8 C. B., 894.

damaged, infringes his covenant by bringing foreign clay on to the demised land and there making it into bricks.[1]

Quiet enjoyment.

And, of course, every lease should contain the usual covenant by the lessor for quiet enjoyment. In *Shaw* v. *Stenton*[2] a lessor covenanted, that the lessee should and might peaceably and quietly have, hold, occupy, possess, and enjoy the demised mine without any let, suit, trouble, molestation, interruption, or disturbance whatsoever. The lessor, in working ironstone, which lay above the demised mine, caused part of the roof of the demised mine to crush and fall in, and also caused the demised mine to be flooded. At the same time no act was done by the lessor upon the demised mine itself. It was held, that, in respect of both acts of damage, the covenant was infringed.[3] The mere grant of the right to work may, however, sometimes prevent a lessor or any person claiming under him from doing any act whereby such working may be made impossible. In *Glasgow* v. *Hurlet Alum Co.*[4] a lease was made of certain alum mines. A subsequent lease was made of certain underlying coal seams; and the coal lessees had worked out all the coal, except certain pillars which supported the roofs of the seams. If these pillars were removed, the working of the alum would have become impossible. The coal lessees proceeded to remove the pillars. It was held, that they were not entitled to do so.[5]

Liability to indemnify for demising stranger's mine.

A lessor may be liable to indemnify the lessee, if property, which he purports to include in the demise, belongs to a third party, and the latter recovers against the lessee for working it.[6]

b. Duty to Work.[7]

Express duty to work should be thrown on lessee.

Whenever it is intended to make it compulsory on a lessee to work, proper provisions for that purpose should be inserted.

[1] Newton *v.* Nock, 43 L. T. N. S. 197.

[2] 2 H. & N. 858.

[3] See further, as to covenants for quiet enjoyment, *ante*, pp. 210, 211.

[4] 3 H. L. C. 25.

[5] It should be observed, however, that the coal lease contained a clause, that nothing thereby granted should "in any way injure the rights of the parties who lease the alum ores;" thereby showing beyond doubt, what the intention was.

[6] See Thomas *v.* Atherton, 10 Ch. D. 197, 199.

[7] Provisions as to working for the purpose of securing as large a royalty as possible have been already considered: see *ante*, pp. 218, *et seq.*

It is clear, that a lessee cannot be compelled to work a mine on the mere ground, that it has been included in the demise, and a royalty reserved in respect of it;[1] or, apparently, on the mere ground, that he has covenanted, "in working it," to do certain things.[2] However, where a lessee has entered into an absolute covenant to "carry on, get, and work" a mine; and has abandoned it; he will, independently of his liability (if any) on account of rent or royalty, be liable, *primâ facie*, on the covenant; although its performance would have involved a useless expense.[3] And, of course, he will not be discharged from such a covenant merely because he has also covenanted to work in a workmanlike manner.[4] Where a lessee of iron mines covenanted to work, unless the ironstone would not, by itself, or with a "proper mixture" and process in the manufacturing, make good common pig iron, it was held, that the meaning of the covenant was, not that the proper mixture should be found upon the demised premises, but that it should be procured by the lessee.[5] Specific performance cannot be obtained of a covenant to work.[6] If the law were otherwise, the Court would be subjected to incessant applications as to the working; and would, in effect, have thrown upon it the duty of managing and superintending the working; and this duty it invariably declines.[7]

But performance not specifically enforceable.

Similar observations apply to particular modes of working; such as simultaneously working, or working *pro ratâ*, two or more seams comprised in the same lease. Thus, in *Abinger* v. *Ashton*,[8] three overlying and underlying seams; the T seam, which was uppermost, the B seam, which was the next, and the C seam, which was the lowest; were comprised in the same

So in case of particular modes of working.

[1] Wheatley *v.* Westminster Brymbo Coal Co., 9 Eq. 539, 554; Abinger *v.* Ashton, 17 Eq. 370. See also James *v.* Cochrane, 7 Exch. 170.

[2] See James *v.* Cochrane *u. s.* 179.

[3] Jervis *v.* Tomkinson, 1 H. & N. 195. Cf. James *v.* Cochrane, *u. s.*, 178, 179.

[4] Walker *v.* Jeffreys, 1 Ha. 350, 351, 352; Jervis *v.* Tomkinson, *u. s.*

[5] Foley *v.* Addenbrooke, 13 M. & W. 174.

[6] See Wheatley *v.* Westminster Brymbo Coal Co., *u. s.*, 538, 551, 552; Abinger *v.* Ashton, *u. s.*, 358. See also Booth *v.* Pollard, 4 Y. & C. Exch. Eq. 61; Pollard *v.* Clayton, 1 K. & J. 462.

[7] Pollard *v.* Clayton, *u. s.*; Wheatley *v.* Westminster Brymbo Coal Co. *u. s.*

[8] 17 Eq. 358. A covenant to work "at all times" two or more seams of coal is, as was observed in this case (p. 370), frequently incapable of literal performance.

lease. The lessees covenanted to work and carry on at all times the said seams with their utmost skill and ability, in the best and most effectual manner, to the best advantage, and according to the common mode and usual practice of carrying on coal works with effect. After having for some time worked the three seams, they ceased to work the T seam, and were working the C seam in advance of the B seam. It was held, that there had been no breach of the covenant; and a suit to compel the simultaneous working of all the seams was dismissed.[1] And where there is a breach of such a covenant; the remedy is usually in damages only.[2] In no such case can the object of the lessor be indirectly reached by an injunction to restrain the working altogether unless the particular mode in question is pursued.[3] To justify such an injunction the lessee must have entered into some restrictive or negative covenant of a precise kind; as, for instance, not to work at all except in the particular mode specified.[4] This is a principle, which is applicable to other cases besides those of mining leases. But to mining property it is peculiarly applicable. The Court has the greatest reluctance to grant injunctions to restrain the working of mines; on account of the great injury and inconvenience which may be caused. And it invariably refuses to do so, unless there is a "breach of an express covenant, or uncontroverted mischief."[5] *À fortiori*, an injunction will not be granted, if the particular mode of working in question be shown to be not in accordance with the usual practice in the district.[6] And, of course, it will not be granted, if it be shown to involve probable danger to life.[7]

Remedy for breach usually damages and not injunction.

Court reluctant to restrain workings.

[1] Cf. Wheatley *v.* Westminster Brymbo Co., 2 Dr. & Sm. 347; 9 Eq. 540, 553, 554. Cf. also Strelley *v.* Pearson, 15 Ch. D. 113.

[2] Wheatley *v.* Westminster Brymbo Coal Co., 9 Eq. 554.

[3] Abinger *v.* Ashton, 17 Eq. 358, 371.

[4] *Ib.*

[5] See Anon. Amb. 209. *per* Lord Hardwicke; Wheatley *v.* Westminster Brymbo Coal Co., 9 Eq. 551, 552; *ante*, p. 62, n. [1], and other cases there cited.

[6] Abinger *v.* Ashton, 17 Eq. 358, 377. It was shown to be the common practice in Cheshire, the district in question, to work a lower seam before working a higher.

[7] Abinger *v.* Ashton, *u. s.* 373, 374, 375.

c. Instroke—Sinking Pits or Shafts.

(*a*) *Generally.*

Meanings of "instroke" and "outstroke."

The right of instroke is the right of conveying minerals from a demised mine to the surface through a pit or shaft in an adjoining mine. It is the converse right to that of outstroke; which is the right of conveying minerals from an adjoining mine to the surface through a pit or shaft in the demised mine.[1]

Importance of right of instroke.

Where the lessee of a mine is also the lessee, or is the owner, of an adjoining mine, the importance to him of possessing the right of instroke is obvious; having regard to the expense which usually attends the sinking of a pit or shaft. It may, on the other hand, be extremely important to a lessor to be entitled to compel his lessee to sink a pit or shaft upon the demised premises. He may thus best ensure that, during the demise, the mine shall be worked to the fullest advantage; or that, at the end of the demise, it shall, in the event of any minerals then remaining unworked, be delivered up in a condition as favourable as possible to the continuance of the working. If he is not so entitled, the lessee will, if in a position to do so, probably work by instroke; and may, if not in such a position, prefer leaving the mine altogether unworked to undergoing, before working, the expense of sinking a pit or shaft.

(*β*) *Instroke.*

Lessee entitled, *primâ facie*, to right of instroke.

The lessee of a mine is entitled, *primâ facie*, to work and get the minerals by instroke.[2] And he will not be deprived of the right to work by instroke, unless by clear and specific provisions. Thus, if he has obtained powers to make communications between the demised mine and adjoining mines, for the express purpose of working the adjoining mines by outstroke, and to work by outstroke accordingly; and, by means of these same communications, to work the demised mine by instroke; and has covenanted not to open any communications between the

[1] See *infra*, Sect. 4, (*a*).

[2] Whalley *v.* Ramage, 10 W. R. 315; Lewis *v.* Fothergill, 5 Ch. 103; Jegon *v.* Vivian, 6 Ch. 742, 755, 756.

demised mine and the adjoining mines, and not to carry any minerals along any communications between the demised mine and the adjoining mines, except in pursuance of his powers; he cannot be prevented from making communications into an adjoining mine for the purpose of working, and by means thereof working, the demised mine by instroke. And it is immaterial, that such communications may not have been made for the primary purpose of working the adjoining mine by outstroke; or that, from the absence of shafts in the demised mine, it may never be possible to work the adjoining mine by outstroke. If, through breaches made in the barrier between the demised mine and an adjoining mine he is entitled to carry the minerals of the demised mine, he is entitled to make the breaches for that very purpose.[1] However, his position may be different, if he is acting with *mala fides*, or unskilfully.[2]

(γ) *Sinking Pits or Shafts.*[3]

Lessee not bound, *primâ facie*, to sink pits or shafts. And, to bind him, intention must be clearly shown.

Consistently with the principle, that a lessee is entitled, *primâ facie*, to work by instroke,[4] he is not bound, *primâ facie*, in order to get the minerals, to sink pits or shafts. And he will not incur liability by not sinking a pit or shaft on the mere ground that, at the date of the lease, he was not the owner or lessee of any adjoining mine:[5] or that both lessor and lessee contemplated as possible or probable the sinking of pits or shafts:[6] or that the lessee is empowered to sink a pit or shaft, and to bring the minerals to the surface, and to make roads, and to carry the minerals over the surface:[7] or that he has cove-

[1] James *v.* Cochrane, 8 Exch. 556, 574, 575: cf. Lewis *v.* Fothergill, 5 Ch. 108, 109. The decision upon this point was assisted by the decision, which had been previously come to, that the lessee was entitled to use the demised mine as a thoroughfare, and not merely as a terminus: see *post*, Chap. XVI., Sect. 2, *b.* (γ). It is nevertheless a strong decision: see and consider the argument.

[2] See Lewis *v.* Fothergill, *u. s.* 106, 110.

[3] As to the right of a lessee (as distinguished from the obligation upon him) to sink pits or shafts, see *ante*, pp. 227, 228.

[4] See *ante*, p. 231.

[5] Jegon *v.* Vivian, 6 Ch. 742, 756.

[6] James *v.* Cochrane, 7 Exch. 177; 8 Exch. 556, 577; Jegon *v.* Vivian, 6 Ch. 754, 756.

[7] Lewis *v.* Fothergill, *u. s.* 104; Wheatley *v.* Westminster Brymbo Coal Co. 9 Eq. 539, 546; Jegon *v.* Vivian, *u. s.* 755.

nanted not to sink a pit or shaft except in particular parts of the demised property:[1] or that the lease contains a provision, that the payment of a dead rent shall not commence for a specified number of years, if, within that time, the necessary steps are taken, *bonâ fide*, to win and work:[2] or that, by not sinking a pit or shaft, much of the mineral will necessarily be wasted:[3] or that, if, instead of sinking a pit, the mine is worked by instroke, it will be exposed either to the peril of the water naturally accumulating within its own area being insufficiently drained, or to the peril of receiving an influx of water from the adjoining mine; no injury from either cause having actually taken place:[4] or that the lessee has covenanted to work "uninterruptedly, efficiently, and regularly according to the usual or most approved practice;" and that the working cannot be carried on to the fullest advantage unless a pit or shaft is sunk:[5] or that he has covenanted to work in a "proper and workmanlike manner;" at all events in districts where working by instroke is usually practised:[6] or that the lease reserves the liberty of entering the demised property to view its condition; and that no entry can be made unless a pit is sunk:[7] or that it contemplates the surrender, at its expiration, of the demised property in such a state as to allow of the lessor working the remaining minerals; and that such working cannot immediately, or cannot profitably, be undertaken, if a pit has then to be sunk to reach them.[8] *À fortiori*, he will not incur such liability where the lease empowers him to work by outstroke; any argument founded upon injury to the demised property by breaking the barrier being, in such a case, inapplicable.[9] The necessity, under these circumstances, of requiring a lessee to specifically covenant to

[1] Wheatley *v.* Westminster Brymbo Coal Co., 9 Eq. 551, 552.

[2] Lewis *v.* Fothergill, 5 Ch. 103. Cf. James *v.* Cochrane, 8 Exch. 556. As to "winning," see *ante*, pp. 219, 222, 223.

[3] Jegon *v.* Vivian, 6 Ch. 742: see the argument.

[4] Lewis *v.* Fothergill, *u. s.*

[5] Wheatley *v.* Westminster Brymbo Coal Co., *u. s.* 538, 548, 549.

[6] Lewis *v.* Fothergill, *u. s.* 103, 110; Jegon *v.* Vivian, *u. s.* 756. The evidence of experts will be admitted to explain the local meaning of such a covenant: Lewis *v.* Fothergill, *u. s.* 107, 110.

[7] Jegon *v.* Vivian, *u. s.* 742: see the argument.

[8] Jegon *v.* Vivian, *u. s.* 754, 755. 756, 757.

[9] See Lewis *v.* Fothergill, *u. s.* 108, 109. Cf. James *v.* Cochrane, *u. s.*; *ante*, p. 232.

But he will be bound, if he has covenanted.

sink pits or shafts, if such be the intention, is obvious. Where a lessee has entered into a specific covenant to sink a pit or shaft, he will be liable for not performing it; although its performance may involve, so far as the actual working of the mine is concerned, an useless application of time, labour, and expense.[1] The measure of damages for non-performance is the expense the lessor would be put to in himself making the pit or shaft.[2]

d. Surface or Mine Protected or Deprived of protection against Damage.

(*a*) *Surface.*

Lease should contain provisions as to support for surface.

Provisions, either preserving support for, or enabling it to be withdrawn from, a surface should be clear and unambiguous. In *Hodgson* v. *Moulson*[3] a very ambiguous covenant as to support was construed in favour of the lessor. There lessees covenanted to work in a workmanlike manner, and to "leave pillars of the solid stone of sufficient strength to support the roofs of the said mines, and to get and clear the said stone in the usual and best way in which the same is done in other works of a like character in Clayton." They also covenanted to pay for surface damage; and, at the expiration of the term, to fill up the pits and shafts. They left pillars of sufficient strength to enable the mines to be worked properly and in the manner usual in Clayton, but not of sufficient strength to prevent the surface from subsiding. They were

[1] Jervis *v.* Tomkinson, 1 H. & N. 195. Cf. James *v.* Cochrane, 7 Exch. 170.

[2] See Pell *v.* Shearman, 10 Exch. 766: see p. 769. The defendants in this case covenanted with the plaintiff, that, if he would surrender a lease to his lessor, they would within two years, or within such period as should be agreed in a new lease, which the lessor had agreed to grant to them, sink upon the demised premises a pit to the depth of 130 yards in search of coal; and, in case a marketable vein of coal should be reached, pay to the plaintiff £2,500. The plaintiff, having sued the defendants for breach of covenant, gave evidence to show, that, if the defendants had sunk the pit, marketable coal might have been found. It was held, that the plaintiff was entitled to more than nominal damages, and that the true measure of damage was the amount which he had lost by being deprived of the opportunity of finding marketable coal.

[3] 18 C. B. N. S. 332.

held liable on the covenant. It was observed, that the lease contemplated the working out of the whole of the stone during the term; and that it could not, therefore, have been the sole object of the covenant to compel such a working as would enable the lessor to continue it after the expiration of the lease.[1] Where a lessee, contrary to his covenants, causes the fall of fences bounding the demised land by excavations under them, he may be compelled by mandatory injunction to restore them to their former condition.[2] The ordinary mode of providing, that the surface shall be supported, but that the mineral owner shall not, at the same time, be obliged to leave the whole of the underlying minerals unworked, is to require him to leave unworked pillars of the minerals in specified places and of specified dimensions,[3] or to substitute artificial props according as the natural props are removed.[4]

And as to fencing pits.

As will be hereafter[5] seen, if a mineral owner leaves pits or shafts unfenced, and horses or cattle belonging to the overlying surface owner are thereby injured, the mineral owner will, in general, be *primâ facie* liable. Express provisions as to the fencing of pits and shafts should, however, in all cases be inserted. It will sometimes be proper for a lessor to stipulate, that the mineral owner shall fill up pits and shafts when they are no longer wanted, and restore the surface.[6]

And as to compensation for damage to crops, &c.

And provision should in all cases be made as to compensating a lessor or his tenants for damage done to the crops by the mineral owner carrying minerals over, or depositing rubbish upon, or otherwise using, the surface; and for damage or inconvenience caused by smoke issuing from furnaces used by the mineral owner in his workings. A covenant to make such compensation runs with the land;[7] and, if entered into by two or more

[1] In cases like Hodgson *v.* Moulson, the surface owner is, however, *primâ facie*, entitled to support independently of any covenant: see *post*, Chap. XV., Part C., Sect. 1, *a* (*β*).

[2] Newton *v.* Nock, 43 L. T. N. S. 197.

[3] See, as to the necessity of this, Lewis *v.* Marsh, 8 Ha. 99.

[4] As to the construction, in a Scotch instrument, of restrictions on carrying workings near houses, see Gillespie *v.* Russel, 9 Sess. Cas. (Ser. 3), H. L. 130.

[5] *Post*, Chap. XIV., Sect. 3, *c* (*β*).

[6] See Wilson *v.* Waddell, 2 App. Cas. 100.

[7] Norval *v.* Pascoe, 34 L. J. Ch. 82, 84.

persons, jointly and severally, will bind an assignee of any of them.[1]

(β) *Mine.*

Lease should contain provisions as to support for mine.

As in the case of the surface,[2] provisions securing support for the mine should be free from ambiguity. However, a covenant by a lessee, that, at the determination of the lease, he will "leave" sufficient pillars for the support of the roof, and for preventing thrusts and creeps, precludes him from, in the meantime, removing the pillars.[3] Where mines were in mortgage; and the mortgagor by arrangement with the mortgagees demised the mines to a trustee for the mortgagees; and the lessee covenanted not to remove the pillars of the mines without the consent of the mortgagor and his assigns, or other the person or persons for the time being entitled to the premises; it was held, that the covenant was for the protection of the equity of redemption, and that the mortgagees had no power to consent to the removal.[4] Where an overlying and an underlying seam are comprised in the same lease, and they are separated by a narrow interval, it is frequently desirable, in order to secure support for the overlying seam, to provide, that the underlying one shall not be worked in advance. The necessity of framing every such provision in the form of a negative covenant has been already adverted to.[5]

And as to dangerous gases.

And as to drowning.

A lessor should, in many cases, require the lessee to covenant not to do or leave undone any act whereby the demised mine may be rendered obnoxious to dangerous gases from an adjoining mine. There can be no doubt, that a lessee will not, independently of a covenant (if any) entered into by him not to allow the demised mine to be drowned, or to work the demised mine in a proper and workmanlike manner, be allowed to work in such a way as to probably cause the mine to be drowned.[6] The

[1] Norval *v.* Pascoe, 34 L. J. Ch. 82; 84.

[2] *Ante*, p. 234.

[3] See Mostyn *v.* Lancaster, 51 L. J. Ch. 696, 701, 702.

[4] *Ib.* 696: affirmed 31 W. R. 686.

[5] See *ante*, p. 230. The lessee of a mine may sometimes be disabled from depriving it of support, if the rights of the lessee of a superjacent mine would be affected: see Glasgow *v.* Hurlet Alum Co., 3 H. L. C. 25, cited *ante*, p. 228.

[6] See Lewis *v.* Fothergill, 5 Ch. 110; and cf. Jegon *v.* Vivian, 6 *ib.* 756: see also Anon. Amb. 209; Hodgkinson *v.* Crowe, 19 Eq. 594.

lessor should, however, in all cases require the lessee to enter into an express covenant not to do, or suffer to be done, any act or thing which may occasion or tend to produce the drowning of the mine; and he should take care, that no provision is inserted, which may neutralise the effect of such a covenant. In *Rolleston* v. *New*[1] a lessee entered into such a covenant. He also covenanted to leave the lessor, at the end of the term, if he should so require, all the engines and machinery, which should have been used in and about the working, upon receiving twelve months' notice from the lessor, and being paid for the same. The lease, however, contained a proviso, that the lessee might at any time during the term, or within twelve months after its expiration, remove all the machinery and engines, unless the lessor should be minded to purchase. Fourteen years before the expiration of the term the lessee became insolvent; and his trustees gave the lessor notice of their intention to remove the engines and machinery, unless he should be minded to purchase. It was conceded by the Court, that the trustees might possibly be liable in damages, if the mine were actually drowned.[2] But it was held, that the lessor could not oblige them to leave the engines and machinery unemployed upon the demised premises until the end of the term;[3] and that, unless he gave notice of his intention to purchase, and paid, they could not be restrained from removing them; although such removal would occasion or tend to produce the drowning. Independently of his liability (if any) under his covenants, a lessee, who removes a barrier between the demised mine and an adjoining mine, is *primâ facie* guilty of waste, and may be made liable accordingly.[4] However, in this case also, the lessor should not rely upon the *primâ facie* position. He should always require the lessee to enter into an express covenant to keep up proper barriers to protect the mine from being drowned.[5]

A lessor should also, of course, require the lessee to enter into

And as to repairs.

[1] 4 K. & J. 640.

[2] See pp. 648, 649.

[3] Cf. Beaufort *v.* Bates, 3 De G. F. & J. 381, 395.

[4] Marker *v.* Kenrick, 13 C. B. 188.

[5] See, as to the necessity of this, Lewis *v.* Fothergill, 5 Ch. 108: see also Jegon *v.* Vivian, 6 *ib.* 758, 789; and cf. Wilson *v.* Waddell, 2 App. Cas. 100. As to the effect of a covenant to "leave" pillars, see Mostyn *v.* Lancaster, 51 L. J. Ch. 696, 701, 702; *ante*, p. 236.

specific covenants to repair and keep in repair. In *James* v. *Cochrane*[1] the lessee of a mine covenanted not to allow it to be overburdened by water; and to keep the levels, drifts, and necessary staples for air clear and in good repair, order, and condition from the surface of the earth down to the levels and drifts; and to pump all water out of the mine. It was intimated, that suffering the workings and aircourses of an old seam of the mine, which had been partially worked, but which was being worked no longer, to remain full of water, whereby the aircourses in that seam were interrupted, was not a breach of the covenant as to repairs. Specific performance cannot be had of a covenant to repair.[2] Nor in general can such a covenant be indirectly enforced by injunction.[3]

No specific performance as to repairs.

A covenant to work in a "proper and workmanlike manner" does not mean, *primâ facie*, in such a manner only as shall be most advantageous for the lessor. It means, *primâ facie*, in such a manner as shall not be simply an attempt to get out of the earth as much mineral as can be got for the particular purpose of the lessee, regardless of any ordinary or workmanlike proceeding.[4]

Meaning of "proper and workmanlike manner."

SECT. 4.—USER OF SUBSOIL.[5]

(*a*) *Outstroke.*

Lessee not entitled, *primâ facie*, to right of outstroke.

It has been already stated, that the right of outstroke is the right of conveying minerals from an adjoining mine to the surface through a pit or shaft in the demised mine.[6] The importance of possessing the right is obvious; having regard to the expense, which usually attends the sinking of a pit or shaft. The lessee of a mine, as such, is not entitled, *primâ facie*, to work

[1] 8 Exch. 556.

[2] See Flint *v.* Brandon, 8 Ves. 159.

[3] Abinger *v.* Ashton, 17 Eq. 376. For provisions as to inspection, see *ante*, p. 225.

[4] Lewis *v.* Fothergill, 5 Ch. 108, *per* Lord Hatherley. The evidence of experts will be admitted to explain the local meaning of such a covenant, *ib.* 107, 110. In Eadon *v.* Jeffcock, L. R. 7 Ex. 393 (*per* Cleasby and Martin, BB.), it was said that lessees, even in the absence of covenant, are bound to work in the usual and approved mode of working in the district. As to the consequences of not making covenants several as well as joint, see Bradburne *v.* Botfield, 14 M. & W. 559.

[5] As to user of surface, see *ante*, pp. 227, 228.

[6] *Ante*, p. 231.

by outstroke. His position is not within the principle formerly laid down; that the lessee of a mine or quarry has, speaking generally, during the duration of his interest, as absolute a right to use as he thinks proper the mine or quarry, the containing chamber, and the space or vacuum which the working of the minerals creates, as if he were the owner in fee.[1] In working by outstroke the acts of the lessee of a mine, as such, are not confined within the ambit of the solum demised to him. He of necessity operates, or in part operates, in land not comprised in his demise. Nor can he justify his operations, because he may be entitled under a grant, express or implied,[2] to use the land in question as a way for the conveyance of the demised minerals. The grantee of a right of way for the conveyance of minerals from a particular mine cannot, *primâ facie*, use the way for the conveyance of minerals from any other mine.[3] Accordingly, if a lessee desires to exercise the right of working by outstroke, he should expressly stipulate for the right to do so. And if he works by outstroke without having the right to do so, the lessor may obtain compensation by way of wayleave rent upon the minerals carried through the demised mine.[4]

(β) *Ventilation of adjoining Mine.*

But is entitled to use mine for ventilation.

A lessee is entitled, *primâ facie*, to use, or permit to be used, the demised mine for the purpose of ventilating an adjoining mine.[5] If, therefore, it is desired to deprive him of the right to do so, or to make his exercise of it subject to the payment of an air-leave rent, express provisions for that purpose should be inserted.

(γ) *Drainage of adjoining Mine.*

Or drainage.

A lessee is not entitled, *primâ facie*, to artificially conduct water from an adjoining mine into the demised mine.[6] But a lessee is entitled, *primâ facie*, to permit the demised mine to

[1] *Ante*, pp. 70, 71.

[2] See, as to ways of necessity, *post*, Chap. XVI., Sect. 3.

[3] See *post*, Chap. XVI., Sect. 2, *b* (β).

[4] See *ib.*, Sect. 6, *b*. The Scotch law is the same: Mungle *v.* Young, 10 Sess. Cas. (Ser. 3) 901. Similarly the grantee of the right is not entitled to exceed it: *ib.*

[5] Jegon *v.* Vivian, 6 Ch. 758, 759.

[6] See *ib.* 758. See also *post*, Chap. XVII., Part C., Sect. 1, *a*.

receive, by the natural action of gravitation, the drainage of an adjoining mine.[1] And if he makes, or permits to be made, in the adjoining mine any conduits or channels, not for the purpose of artificially conducting water through the demised mine, but in the ordinary and proper course of working the adjoining mine; and water flows along such conduits or channels into the demised mine; he is, *primâ facie*, free from liability.[2] If, therefore, it is desired to deprive him of his rights in those respects, or to make his exercise of them subject to the payment of a waterleave rent, express provisions for that purpose should be inserted. Where a lessee covenants to leave proper and sufficient barriers in the demised mine against all adjoining mines, and to prevent the draining or laying dry any such adjoining mines, he will, if necessary, be compelled, by mandatory injunction, to perform his covenant.[3]

Sect. 5.—ASSIGNMENT.

Lessor should stipulate for covenant against assignment.

It will, in most cases, be proper for a lessor to require the lessee to covenant, that he will not assign or underlet without the previous leave in writing of the lessor.[4] A mere equitable deposit of a lease is not a breach of a covenant not to assign without license.[5]

Account against equitable owner.

An account probably lies against the equitable owner of a lease, who has entered into possession and worked. According to some decisions this was so, even before the Jud. Acts: on the ground, either that he had worked under the authority of the lease, and was subject, therefore, to the payment which it imposed; or that he must be treated as a trespasser, and was liable to account as such.[6] But there were decisions of more authority directly to the contrary.[7]

[1] Jegon *v.* Vivian, 6 Ch. 758.

[2] *Ib.* See also *post*, Chap. XVII., Part C., Sect. 2, *a* (*β*).

[3] Mexborough *v.* Bower, 7 Beav. 127.

[4] It is sometimes convenient to restrict the covenant by providing, that it shall not extend to the case of responsible tenants: see Whitehead *v.* Bennett, 9 W. R. 626.

[5] Bowser *v.* Colby, 1 Ha. 109, 138.

[6] See Wright *v.* Pitt, 12 Eq. 408, 417. For the form of the order, see p. 417. See also Clavering *v.* Westley, 3 P. Wms. 402; Gt. W. R. Co. *v.* Rous. L. R. 4 H. L. 650.

[7] Walters *v.* North Coal Co., 5 De G. M. & G. 629; Cox *v.* Bishop, 8 *ib.* 815.

SECT. 6.—DETERMINATION.[1]

a. Forfeiture.

Proviso avoiding lease on breach of covenant.

A clause is usually inserted, providing, that, in the event of the lessee making default in payment of the rent, or in performance or observance of the other covenants or provisions of the lease, the lease shall be absolutely void. Where a lease contains such a clause, the clause is considered to be inserted for the benefit of the lessor only, and not for the benefit of the lessee.[2] Subject to the provisions of the Act 44 & 45 Vict. c. 41, the lessor may, on the happening of the event in question, pronounce the lease to be void or not, at his option.[3] And the lessee will not, on the happening of the event, be allowed to insist, that, by reason of his previous payment of rent, he has become a tenant from year to year;[4] or be allowed, in an action against him for subsequent breaches of covenant, to insist, that the lease has been already avoided.[5] On the other hand, even independently of those provisions, the lessor must, on the happening of the event in question, do some act showing his intention to avoid the lease; and cannot, without doing such act, treat the lessee as a mere trespasser.[6] Where a lease contained a proviso avoiding it, if the demised mine "should stop or cease working at any time two years," it was intimated that, to preserve the lease, the working must be *bonâ fide*, and not collusive or fraudulent.[7] An action to recover possession will lie for mines as well as for surface property.[8]

Conv. Act, 1881.

However, the Act 44 & 45 Vict. c. 41, provides, that a right of forfeiture of a "mining lease" shall not be enforceable by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the breach complained of; and, if capable of remedy, requiring the lessee to remedy it; and, in

[1] As to notices to quit under Irish holdings, see 39 & 40 Vict. c. 63, cited *ante*, p. 65.

[2] Doe *v.* Bancks, 4 B. & Al. 409; Roberts *v.* Davey, 4 B. & Ad. 664.

[3] Doe *v.* Bancks, *u. s.*, 401; Muskett *v.* Hill, 5 B. N. C. 694.

[4] Doe *v.* Bancks, *u. s.*, 401.

[5] *Ib.*

[6] Roberts *v.* Davey, *u. s.*: see also Bowser *v.* Colby, 1 Ha. 130, 131.

[7] Doe *v.* Bancks, *u. s.*, 403.

[8] See *post*, Chap. XXII., Sect. 1. *a.*

any case, requiring the lessee to make compensation in money; and the lessee fails within a reasonable time to remedy the breach, if capable of remedy, and to make reasonable compensation. And the lessee may, (either in the lessor's action or in his own), apply to the Court for relief; and the Court may grant or refuse it, as it thinks fit; and, in case of relief, may grant it on such terms as it thinks fit. But these provisions do not extend to a clause against the assigning, underletting, parting with the possession, or disposing of the land leased; or to a clause for forfeiture on bankruptcy, or on the taking in execution of the lessee's interest; or to a clause for allowing the lessor to have access to or inspect books, accounts, records, weighing machines, or other things, or to enter or inspect the mine or the workings thereof. And they do not apply in the case of non-payment of rent.[1] The notice required to be served is sufficiently served, if left for the lessee at the office or counting-house of the mine; or if sent there by post in a registered letter addressed to the lessee by name, and such letter is not returned through the post-office undelivered; and service is deemed to be made at the time when the registered letter would in ordinary course be delivered.[2]

Delay.

And, having regard to the fluctuating character of mining property, the lessor must in all cases be prompt in enforcing his right of forfeiture.[3]

Relief within six months.

And the lessee may, at any time within six months after execution, obtain relief against forfeiture for a breach of covenant to pay rent; upon paying the rent and arrears and all costs of the lessor.[4] And he may equally obtain relief, whether the lease contains a mere power of re-entry on non-payment, or a proviso that in that case the lease shall be void.[5]

[1] See s. 14.

[2] See s. 67. For the meanings of rent and mining lease under the Act, see *ante*, p. 160, n. [1].

[3] Bowser *v.* Colby, 1 Ha. 139.

[4] *Ib.* 109.

[5] *Ib.* A lessor (Scotland) reserved a right to forfeit, if dissatisfied with the working. He was held not bound to state the grounds for his dissatisfaction. Holdsworth *v.* Brand's Trustees, 2 Sess. Cas. (Ser. 4), 683. As to damages for not giving up possession, and as to the lessee having a reasonable time to give up possession, see S. C. 3 *ib.* 304; 4 *ib.* 369. A lease is frequently made avoidable on the bankruptcy of the lessee. For a Scotch decision on such a clause, see Glass *v.* Haig, 4 Sess. Cas. (Ser. 4), 875.

b. Surrender.

Lessee should stipulate for liberty to surrender.

The lessee should, if possible, protect himself against losses in respect of dead rent, by stipulating for liberty to surrender the lease, in the event of the mine becoming exhausted; or becoming incapable, in consequence of fire, water, or other insuperable accident, of being worked.[1] And he should take care, that the stipulation is not affected by the other portions of the instrument. A lease contained numerous covenants by the lessees as to the mode of working. It then provided, that, if the lessees should give notice of their desire to give up possession before the end of the eighth year of the term, then, "all arrears of rent being paid, and all and singular the covenants" on the part of the lessees having been performed, the lease should be void; "but, nevertheless, without prejudice" to any remedy to which "any of the parties" might be entitled for breach of any of the covenants. It was, (notwithstanding the sub-proviso), held, that the performance of all the covenants by the lessees was a condition precedent to their right to determine.[2] And in a lease containing a stipulation, that the rent should cease, in case the whole of the coals, so far as the same could be "fairly wrought," should be worked out before the expiration of the term, it was held, that "fairly wrought" did not refer to profit; but meant that which can be fairly and properly gotten according to mining usage without extraordinary difficulty or expense.[3] And the lessee should also take care, that the language of the stipulation expressly applies to accidents, which may have previously occurred. In a case at law before the Jud. Acts, it was held, that a stipulation defective in that respect did not free the lessee from the liability to pay rent; although the lease was expressed to commence from a time antecedent to the happening of the accident in question, and

[1] See Gowan *v.* Christie, L. R. 2 Sc. & D. 282; Strelley *v.* Pearson, 15 Ch. D. 113.

[2] Grey *v.* Friar, 4 H. L. Cas. 565, affirming Friar *v.* Grey, 5 Exch. 584; and overruling Grey *v.* Friar, 15 Q. B. 901, which reversed Friar *v.* Grey, *ib.* 891.

[3] Griffiths *v.* Rigby, 1 H. & N. 237. See, however, Cartwright *v.* Forman, 7 B. & S. 247.

the reference in the stipulation was to accidents "during the continuance of the said term."[1]

Liberty to surrender "at any time."

A lessee sometimes stipulates for general liberty to surrender "at any time" upon giving a specified notice. In *Bridges* v. *Potts*,[2] where such a liberty was given to a tenant from year to year, he was held entitled to give the notice at any time; and not to be confined to giving a notice expiring at a date which corresponded with the commencement of the tenancy. It was observed, that the same principle could not apply to mining tenancies as to ordinary tenancies; both because mining works are essentially experimental and hazardous, and because it matters not at what season of the year they are carried on. If such a lessee determines at a time other than that fixed for the payment of rent, the lessor is entitled to an apportioned part up to the determination.[3]

Waiver of right.

Where lessees gave notice of their intention to surrender; and, after the time fixed by the notice had expired, continued for two months to work out portions of the demised coal, contending that it was usual for a tenant to take away such portions on abandoning a colliery; it was held, that they had not waived the notice.[4]

c. Workings.

(a) Working out before Determination.

Covenants for which lessor should stipulate.

In view of the contingency of a mine being worked out before the determination of the lease, the lessor should require his lessee to covenant, that he will thereupon fill up all pits and

[1] See Jervis *v.* Tomkinson, 1 H. & N. 195. An influx of brine is probably in a lease of salt mines an "inevitable accident:" see *ib.*

[2] 17 C. B. N. S. 314.

[3] 33 & 34 Vict. c. 35. This appeared formerly to be doubtful: see Bridges *v.* Potts, 17 C. B. N. S. 314.

[4] Jones *v.* Shears, 4 A. & E. 832. Where a Scotch lease provided liberty to determine upon the minerals becoming, in the opinion of competent persons, unworkable to a profit, it was held, that the tenant was bound to take the opinion without delay: Thomson *v.* Gordon, 7 Sess. Cas. (Ser. 3), 687. Where a Scotch lease gave liberty to determine if the minerals became "not worth the expense of working," and they became so through a fall in the market price, the lessees were held entitled to determine: Shotts Iron Co. *v.* Deas, 8 *ib.* (Ser. 4), 530. For a difficulty as to payment of rent under a Scotch lease providing for periodical breaks in favour of the tenant, see Fleeming *v.* Baird, 9 *ib.* (Ser. 3), 730.

shafts, and restore the surface; and, of course, such covenants will be binding on the lessee.[1]

(β) *Not working out before Determination.*

Covenants for which lessor should stipulate—generally.

In view of the contingency of a mine not being worked out before the expiration or other sooner determination of the lease, the lessor should stipulate, that it shall be delivered up in a condition as favourable as possible to the continuance of the working.[2] For accomplishing this purpose an effectual provision will, in many cases, be a covenant by the lessee to sink pits or shafts. This subject has been already sufficiently adverted to.[3] A provision sometimes introduced with a similar purpose where an upper and a lower seam are comprised in the same lease, is that one of them either shall, or shall not, be worked in advance of the other. For, in some cases, the working of a lower seam in advance of an upper will relieve the pressure on the upper seam, and so enable a larger proportion of the mineral to be afterwards worked in large blocks: in others it will dislocate the strata in, and irretrievably injure, the upper seam. The necessity of framing such a provision in the form of a negative covenant has been already adverted to.[4] A similar purpose is effected by the ordinary covenants as to repairs; which have been already considered.[5]

Barriers against air and water.

And for a similar purpose the lessor should, in many cases, require his lessee to covenant, that, at or before the determination, he will put up barriers against air and water. In the absence of such a covenant, the lessee will not be liable to compensate the lessor, either by paying waterleave rent, or otherwise; although an adjoining mine of the lessee may, after the expiration of the lease, be drained through the demised mine.[6] And, it is immaterial, that the lessee, during the lease, may have made conduits or channels in the adjoining mine, along which the water flows; such conduits or channels not having

[1] See Wilson *v.* Waddell, 2 App. Cas. 95, 100. Cf. Hodgson *v.* Moulson, 18 C. B. N. S. 332.

[2] As to the effect of a covenant, that works shall be given up in such a state, that the working may be continued, see Jegon *v.* Vivian, 6 Ch. 756.

[3] *Ante*, pp. 232 *et seq.*

[4] See *ante*, p. 230.

[5] *Ante*, p. 237. As to the effect of a covenant to work in a "proper and workmanlike manner," see *ante*, p. 238.

[6] Jegon *v.* Vivian, 6 Ch. 758.

been made for the purpose of artificially conducting the water, but in the ordinary and proper course of working the adjoining mine.[1] And the same principle applies to ventilation as to drainage.[2] The lessor can, in the absence of such a covenant, deprive the lessee of all benefit from the passage of air and water after the determination by himself putting up barriers.[3]

Sect. 7.—Fixtures and Moveable Effects.

Delivery up of fixtures.

Mining leases frequently provide for delivering up to the lessor at the end of the lease the fixtures and moveable effects in and about the mines in question; and for keeping them in proper repair in the meantime. A covenant to erect a smelting mill in connection with a demised mine, and to keep it in repair, and to deliver it up at the end of the lease, runs with the reversion; because it tends to the benefit of the mine.[4] It need hardly be said, that where a lessee has entered into a covenant not to remove the machinery at the end of his lease, an injunction may be obtained to restrain him from infringing that covenant.[5] But, where he has not covenanted, he may be entitled to remove the machinery at the end of the lease; although such removal may occasion the drowning of the mine.[6]

Foley *v.* Addenbrooke.

In *Foley* v. *Addenbrooke*,[7] lessees covenanted to repair and keep in repair a "furnace and furnaces, fire-engine, iron-works, dwelling-houses, and other erections, and buildings;" and the same, ("except the ironwork castings, railways, gins,[8] wimseys,[9] machines, and the moveable implements and materials used in or about the said furnaces, fire-engine, iron-works, stone pits, and premises") so repaired and kept in repair, to deliver up at the expiration of the lease. The lease

[1] Jegon *v.* Vivian, 6 Ch. 758. See also *post*, Chap. XVII., Part C., Sect. 2. *a* (*β*).

[2] Jegon *v.* Vivian, *u. s.*, 759.

[3] *Ib.* As to the effect of a covenant to "leave" pillars, see Mostyn *v.* Lancaster, 51 L. J. Ch. 696, 701, 702; *ante*, p. 236.

[4] Easterby *v.* Sampson, 1 Cr. & J. 105; affirming Sampson *v.* Easterby, 9 B. & C. 505.

[5] See Hamilton *v.* Dunsford, 6 Ir. Ch. 412.

[6] Rolleston *v.* New, 4 K. & J. 640, cited *ante*, p. 237.

[7] 13 M. & W. 174.

[8] A "gin" is a windlass fixed in the ground, and worked by a horse for the purpose of drawing materials from a mine.

[9] A "wimsey" is a similar machine, but worked by a steam engine.

also provided, that the lessors might, on giving the lessees notice before the expiration, purchase the excepted articles; and that, in default of their so doing, the lessees might remove them. It was held, (1) that the lessees, in exercising their right of removal, were not bound to restore, in a perfect state, certain brickwork, which had protected or supported the articles removed; but that it was sufficient for them, doing as little damage as possible, to leave the brickwork in a state fit to be used for similar purposes by the lessors, or by subsequent lessees:[1] and (2) that the exception embraced whatever was in the nature of a machine or part of a machine, as ironwork, or iron castings; but did not embrace what was in the nature of buildings, or support of buildings, although made of iron. In *Beaufort* v. *Bates*,[2] a lessee covenanted to keep in repair the furnaces and other "works" then standing, or which should thereafter be erected, on the demised land, and all other the demised premises; and he also covenanted at the expiration of the term to yield up the property, and all "ways and roads" in or under the demised premises, "in such good repair, order, state, and condition as that the said coal and iron works may be continued and carried on." It was held, that tramplates fastened by the lessee to iron or wooden sleepers, which were sunk in the soil by the pressure of waggons passing over the trams, but were not affixed to the freehold in any other sense, were not subject to the covenant.[3] Beaufort v. Bates.

It has been held, that a covenant, that, if the lessor should, "at any time before the expiration or sooner determination of the lease," give notice of his desire to take all or any part of the machinery, stock in trade, implements, &c., in or about the mines, the lessee would at the expiration deliver the articles specified in the notice, on the lessor paying the value of them, is so injurious and oppressive, that the Court ought not to enforce it, or grant an injunction to prevent a breach of it.[4] Oppressive covenant.

[1] Cf. Beaufort *v.* Bates, 3 De G. F. & J. 381, 397.

[2] 3 De G. F. & J. 381.

[3] It was in evidence in this case, that by the custom of the district in question (the county of Brecon) "ways and roads" in a mining lease did not include tramplates and sleepers: see pp. 387, 390. Cf. Lowther *v.* Cavendish, 1 Eden, 118.

[4] Talbot *v.* Ford, 13 Sim. 173. Cf. Rolleston *v.* New, 4 K. & J. 646, 647.

Sect. 8—ARBITRATION.

Arbitration.

Where a lease contains a stipulation, that disputes between the lessor and the lessee shall be referred to arbitrators, or their umpire, pursuant to the provisions of the Com. Law Proc. Act, 1854; and disputes arise; the Court may, on the application of either party, direct a reference;[1] under which payment of damages may be ordered.[2] And it is no objection to directing a reference, that arbitrators cannot grant an injunction;[3] or appoint a receiver;[4] or that there can be no appeal from their decision.[5] And the Court will not itself decide, but will leave it to the arbitrators to decide, whether the particular matters in dispute are or are not within the agreement to refer.[6]

Sect. 9.—STAMPS.

Stamps.

Where the consideration, or any part of the consideration for which a lease is granted, or agreed to be granted, does not consist of money, but of produce,[7] the value of such produce is deemed a consideration in respect of which the lease or agreement is chargeable with *ad valorem* duty. And where it is stipulated, that the value of such produce is to amount at least to, or is not to exceed, a given sum; or where the lessee is specially charged with, or has the option of paying after, any permanent rate of conversion; the value of such produce is, for the purpose of assessing the duty, estimated at such given sum, or according to such permanent rate.[8] A lease containing several demises for distinct terms, and at distinct rents, if stamped according to the aggregate of the stamps required for the several demises, is properly stamped.[9]

[1] See Willesford *v.* Watson, 14 Eq. 572; 8 Ch. 473: see also Wheatley *v.* Westminster Brymbo Coal Co., 2 Dr. & Sm. 347. See, before the Act, Mexborough *v.* Bower, 7 Beav. 127; Horton *v.* Sayer, 4 H. & N. 643.

[2] Willesford *v.* Watson, *u. s.*

[3] *Ib.*

[4] See Gillett *v.* Thornton, 19 Eq. 606.

[5] Willesford *v.* Watson, *u. s.*

[6] *Ib.* As to the law of Scotland, see Mungle *v.* Young, 10 Sess. Cas. (Ser. 3) 901.

[7] This includes all cases of reservations in kind.

[8] Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 97.

[9] Boase *v.* Jackson, 3 Bro. & B. 185, a decision under the Act 55 Geo. 3, c. 184.

CHAPTER XII.

LICENSES.

a. Generally.

A LICENSE to dig minerals confers no estate or interest in the soil or mine containing them. Nor does it confer any estate or interest in the ungotten minerals; or even in the gotten minerals before the actual getting. It merely authorises the doing of an act, which is, *primâ facie*, unlawful.[1] However, a license to dig minerals, coupled with a grant to carry them away, is an incorporeal hereditament.[2] And, if exercised by an actual taking of possession, it may be the subject matter of use and occupation;[3] and probably may be the subject matter of an action to recover possession.[4] But a license, without an actual taking of possession, cannot be the subject matter of an action to recover possession.[5] And merely digging holes in the soil is not a taking of possession. For the grantee may dig merely to examine the property; and see what kind of bargain he is about to make, or has made.[6]

Interest conferred by licence—generally.

A license to dig minerals, coupled with a grant to carry them away, may be limited in favour of a man and his heirs; or of a man, his executors and administrators.[7] In the former case, it

If coupled with grant, may be limited in fee or to personal representatives.

[1] See Norway *v.* Rowe, 19 Ves. 158; Doe *v.* Wood, 2 B. & Al. 738, 739, 741; R. *v.* St. Austell, 5 *ib.* 700, 701; R. *v.* Tremayne, 4 B. & Ad. 170; Roberts *v.* Davey, *ib.*, 672; Muskett *v.* Hill, 5 B. N. C. 707; 7 Scott, 855; R. *v.* Fayle, 27 L. T. 65; St. Aubyn *v.* St. Aubyn, 1 D. & Sm. 619; L. & N. W. R. Co. *v.* Ackroyd, 31 L. J. Ch. 591; Norval *v.* Pascoe, 34 *ib.* 85. Whether the licensee is entitled to the gotten minerals after the getting depends on whether the license is bare, or is clothed with an interest: see, as to this, *infra*, *b*.

[2] See Crocker *v.* Fothergill, 2 B. & Al. 652, 661; Wood *v.* Leadbitter, 13 M. & W. 843, *et seq.*; Watson *v.* Spratley, 10 Exch. 235; Martyn *v.* Williams, 1 H. & N. 817, 824, 827; Morgan *v.* Crawshay, L. R. 5 H. L. 319.

[3] Jones *v.* Reynolds, 4 A. & E. 805, 809.

[4] See *post*, pp. 252, 253.

[5] Crocker *v.* Fothergill, *u. s.*

[6] Jones *v.* Reynolds, 7 C. & P. 335.

[7] See Haigh *v.* Jaggar, 16 M. & W. 525; 3 Exch. 54; Martyn *v.* Williams,

creates an estate in fee simple.[1] In the latter, it gives, on the death of the grantee, an estate to his executors or administrators, if the duration of the grant has been fixed, and has not then determined.[2] Indeed, it has been said, that, even if the duration has not been fixed, an estate may pass to the executors or administrators, to last as long as any minerals remain ungotten;[3] at all events, if the grant can operate under the Statute of Uses, and the grantee has elected that it shall so operate.[4] But the proposition, even in the latter form, is doubtful.[5] And if it be well founded, the election must be made while there is the power of electing. The executor of the grantee cannot elect.[6] And whether, if the grantee had discontinued working, the executor could, after a considerable lapse of time, again enter as if he were the licensee, is also doubtful.[7] A license is frequently granted, not merely to a person or persons named simply; but to a person named in conjunction with others not named, but described as his partners or co-adventurers. In such a case the persons not named will, equally with the person named, be entitled to exercise the license.[8]

May be granted to persons not named.

"Occupier" under Rail. Cl. or Wat. Cl. Act.

Rateability.

A licensee of minerals, with a grant to carry them away, is an "occupier" within the words "owner, lessee, or occupier," entitled to give the notice mentioned in s. 78 of the Rail. Cl. Cons. Act, 1845, and in s. 22 of the Water Clauses Act.[9] However, a licensee, as such, not having any interest in the soil, is not rateable.[10] But a licensee in exclusive occupation of the land containing the mine; or of buildings, machinery, and roads

1 H. & N. 827, 829; Carr *v.* Benson, 3 Ch. 525, 526.

[1] Martyn *v.* Williams, 1 H. & N. 827, 829.

[2] See Haigh *v.* Jaggar, 16 M. & W. 525, 540; Low Moor Co. *v.* Stanley Coal Co., 34 L. T. N. S. 186.

[3] See Port *v.* Turton, 2 Wils. 170, 172; Atkinson *v.* King, Ir. R. 11 C. L. 540, *per* May, C.J.

[4] See Haigh *v.* Jaggar, 16 M. & W. 525, 540; 3 Exch. 68, 69.

[5] See and consider Low Moor Co. *v.* Stanley Coal Co., *u.s.* See also Atkinson *v.* King, 2 L. R. (Ir.) 346, 350, *per* Christian, L.J.

[6] Haigh *v.* Jaggar, 3 Exch. 54, 68, 69.

[7] *Ib.* 54, 69, 70.

[8] See Norway *v.* Rowe, 19 Ves. 158, 159; Doe *v.* Wood, 2 B. & Al. 724.

[9] See Mid. R. Co. *v.* Haunchwood, &c., Co., 20 Ch. D. 552, 561, As to these sections, see *ante*, p. 5, n. [13]; p. 9.

[10] See Morgan *v.* Crawshay, L. R. 5 H. L. 316; Kittow *v.* Liskeard, L. R. 10 Q. B. 13; *post*, Chap. XXIII., Sect. 4 *c*. Cf. R. *v.* St. Austell, 5 B. & Al. 693.

used in connection therewith; is rateable in respect of such land;[1] or of such buildings, machinery and roads.[2]

b. Bare Licenses and Licenses Clothed with Interests.

A bare license may be created by parol.[3] It confers no interest in the minerals authorized to be dug even after they have been dug;[4] although it enables the licensee to maintain an action for their recovery as against a mere wrongdoer, who removes them.[5] It is revocable;[6] at all events, before it has been actually exercised, and expense has been incurred.[7] And a conveyance by the grantor is sufficient to revoke it.[8] Bare license.

A license to dig minerals, coupled with a grant to carry them away, and convert them to the grantee's own use, creates an incorporeal hereditament in the grantee;[9] and may be limited either in fee simple, or for a term of years.[10] Such a license, to be legally effectual, must be created by deed.[11] But, if created by a mere written contract, followed by exercise and also followed by the expenditure of money, it has apparently been always effectual in equity.[12] Indeed, it has been held effectual, although created by a mere verbal arrangement with an agent, and although the agent exceeded his authority; the principals having stood by and allowed the mining operations to proceed, and having only interposed when they proved successful.[13] And if created by a mere written contract for a License clothed with interest.

[1] R. *v.* Fayle, 27 L. T. 65; Roads *v.* Trumpington, L. R. 6 Q. B. 56.

[2] Kittow *v.* Liskeard, 10 *ib.* 13.

[3] See and consider Wood *v.* Leadbitter, 13 M. & W. 844, 845.

[4] See Haven, &c., Co., 20 Ch. D. 160.

[5] See Northam *v.* Bowden, 11 Exch. 70; where the plaintiff had a license to dig and remove tin, and for that purpose, but without having any interest therein, to dig up the soil with which it was intermixed.

[6] See Webb *v.* Paternoster, 2 Roll. Rep. 143, 152, *per* Dodderidge, J.; Wood *v.* Leadbitter, *u. s.*, 844.

[7] Wallis *v.* Harrison, 4 M. & W. 538.

[8] *Ib.*

[9] *Ante*, p. 249.

[10] *Ib.*

[11] Wood *v.* Leadbitter, *u. s.*, 845, 854; Doe *v.* Powell, 8 Scott, N. R. 693, 701, 703; Watson *v.* Spratley, 10 Exch. 235; Atkinson *v.* King, 2 L. R. (Ir.) 340. Wood *v.* Lake (Sayer, 3), a decision apparently to the contrary, cannot be supported: see Wood *v.* Leadbitter, *u. s.*, 850. Cf. Smart *v.* Jones, 15 C. B. N. S. 717.

[12] See Atkinson *v.* King, Ir. Rep. 11 C. L. 536, 540, *per* May, C.J.; 2 L. R. (Ir.) 320, 335, *per* Ball, C., Morris, C.J., and Deasy, L.J.; Christian, L.J., dissenting. Cf. White *v.* Jameson, 18 Eq. 303.

[13] See Harrison *v.* Ames, 15 L. T. 321.

valuable consideration, an action has always lain for a breach of that contract.[1] Such a license gives to the grantee the right of property in such minerals as he gets, when by the act of getting he has converted them into chattels;[2] but not before.[3] It may be assigned or demised *inter vivos*;[4] but, only, so as to pass the legal interest, by deed.[5] It is capable of transmission by will,[6] or of devolution on intestacy.[7] And it is irrevocable.[8]

c. *Exclusive and Non-exclusive Licenses.*

License *primâ facie* non-exclusive.

The licensee of a right to dig minerals in a particular piece of land, although empowered to carry them away, and convert them to his own use, has not, *primâ facie*, the exclusive right to dig therein.[9] The licensor may, *primâ facie*, himself dig in the same land; or grant as many other similar licenses, exerciseable with respect to the same land, as he thinks fit.[10] And it is difficult to impute to a licensor knowledge of the extent of the licensee's intended operations, or otherwise of his objects in applying for the license; so as to disable the licensor from himself subsequently working, or empowering others to do so.[11] It follows, that one licensee cannot, *primâ facie*, recover possession against another in respect of mines lying within the assigned limits, but not connected with the workings of the former.[12]

Rights of non-exclusive licensee.

A licensor cannot, however, sweep away from a non-exclusive licensee the whole of the benefits of the license. The rights of the parties must be reasonably construed.[13] Nor can a licensor do any act, which will defeat the known objects of a non-

[1] See Smart *v.* Jones, 15 C. B. N. S. 717.

[2] Doe *v.* Wood, 2 B. & Al. 738, 739, 741; Carr *v.* Benson, 3 Ch. 534.

[3] See *ante*, p. 249.

[4] Mountjoy's Case, Godb. 18; Muskett *v.* Hill, 5 Bing. N. C. 694; Martyn *v.* Williams, 1 H. & N. 827.

[5] See Harker *v.* Birkbeck, 3 Burr. 1563; Watson *v.* Spratley, 10 Exch. 235.

[6] Mountjoy's Case, *u. s.*

[7] Martyn *v.* Williams, *u. s.*

[8] Doe *v.* Wood, *u. s.*, 738: Wood *v.* Leadbitter, 13 M. & W. 845, 847; Muskett *v.* Hill, *u. s.*, 707.

[9] Mountjoy's Case, Godb. 17; 1 And. 307; Moor, 174; Cheetham *v.* Williamson, 4 East, 469; Doe *v.* Wood, *u. s.*, 739; Carr *v.* Benson, *u. s.*, 532, 534, 536; Haven. &c., Co., 20 Ch. D. 160. See also Lee *v.* Stevenson, E. B. & E. 510; Newby *v.* Harrison, 1 J. & H. 396.

[10] *Ib.*

[11] Carr *v.* Benson, *u. s.*, 534: cf. Jones, *v.* Reynolds, 4 A. & E. 805, 808.

[12] Doe *v.* Wood, *u. s.*, 724, 737, 739.

[13] Carr *v.* Benson, *u. s.*, 534, 535.

exclusive licensee in applying for his license.[1] And, if a non-exclusive licensee has taken possession of a particular mine, and has actually opened and worked it, he is probably entitled to recover possession against any person who ousts him;[2] at all events, if he is entitled to the exclusive occupation of the soil containing the mine.[3] Indeed he is probably entitled to recover possession, even if he has only taken actual possession of a particular mine.[4] And the taking actual possession of and working one of several seams comprised in the same grant is the constructive possession of the others.[5] However, it seems impossible, by merely striking into a particular seam, to acquire possession of it; at all events, if it is extensive, and runs through a considerable district, or through several collieries.[6] And it is clear, that, in order to take possession of a seam, something more must be done than clearing out an old pit which has not yet reached the seam;[7] however great the expense of so doing may be, and however obvious the reference of the expenditure may be to working the seam.[8] As against a mere trespasser, a non-exclusive licensee's rights are probably larger than as against another licensee.[9]

Exclusive license.

The desirability, under the above stated circumstances, of expressly obtaining an exclusive license, if such be the intention, is obvious. An exclusive licensee has not, any more than a non-exclusive, any interest in the soil; or, before the actual digging, in the minerals authorized to be dug.[10] An exclusive licensee may recover possession against any person, who ousts him;[11] and may maintain trespass against any person, who encroaches on his workings.[12]

See also Lee *v.* Stevenson, E. B. & E. 510; Newby *v.* Harrison, 1 J. & H. 397.

[1] Carr *v.* Benson, 3 Ch. 525, 532.

[2] Doe *v.* Wood, 2 B. & Al. 737: see Roads *v.* Trumpington, L. R. 6 Q. B. 64.

[3] Roads *v.* Trumpington, *u. s.*

[4] Carr *v.* Benson, *u. s.*, 534.

[5] See Low Moor Co. *v.* Stanley Coal Co., 33 L. T. N. S. 436; 34 *ib.* 186. 189; *ante*, pp. 41, 42.

[6] Carr *v.* Benson, *u. s.*

[7] *Ib.*

[8] *Ib.* 535.

[9] Doe *v.* Wood, *u. s.*, 742; Newby *v.* Harrison, *u. s.*, 395; Carr *v.* Benson, *u. s.*, 531, 533. Cf. Northam *v.* Bowden, 11 Exch. 70, cited *ante*, p. 251. Cf. also Low Moor Co. *v.* Stanley Coal Co., 34 L. T. N. S. 186.

[10] See Doe *v.* Wood, 2 B. & Al. 739: see *ante*, p. 249.

[11] Even a non-exclusive licensee may frequently do so: see this page, *sup.*

[12] Harker *v.* Birkbeck, 3 Burr. 1556; Wilson *v.* Mackreth, *ib.* 1824; Port *v.* Turton, 2 Wils. 172; R. *v.* Fayle, 27 L. T. 65: Low Moor Co. *v.* Stanley Coal

d. Usual Provisions.

Generally.

Many of the usual provisions of a mining lease are applicable to a mining license; and with similar consequences.

Rent.

Account.

Payments agreed to be made in respect of a license are in the nature of rent.[1] As in the case of a lessor,[2] a licensor was always entitled, even before the Jud. Acts, to a remedy in Equity for an account; and that irrespectively of whether he was also entitled to an injunction.[3] The equitable assignee of a license stands in a similar position, as regards accounting, to that occupied by the equitable owner of a lease.[4]

Covenants running with land.

A covenant by a licensee to make compensation for surface damage, or to repair the mine, runs with the land;[5] and, if entered into by two or more persons jointly and severally, will bind an assignee of any of them.[6]

Distress.

A power of distress is inapplicable to the subject-matter of a license as such; and should be expressly provided for, if such be the intention.[7]

Re-entry.

A proviso for re-entry is also inapplicable to the subject-matter of a license as such.[8] Its insertion in the grant is nevertheless frequently of use. For, under a license, works may be erected, and corporeal possession had, which it may be competent to the grantor to resume.[9] Where the grant of a license contains a proviso avoiding it on breach of covenant, the proviso is, as in the case of a lease,[10] considered to be inserted for the benefit of the grantor only, and not for the benefit of the licensee.[11] Subject to the provisions of the Act 44 & 45 Vict. c. 41, the grantor may, on the breach, pronounce the grant to be void or not, at his option.[12] However, even independently of those provisions, he must, on the breach, do some act showing

Co., 33 L. T. N. S. 436, 444; affirmed, 34 *ib.* 186.

[1] *Ex parte* Hankey, 1 Mont. & M. 247.

[2] *Ante*, p. 226.

[3] See Wright *v.* Pitt, 12 Eq. 408.

[4] See *ante*, p. 240. See Wright *v.* Pitt, *u. s.*: for the form of the order, see p. 417.

[5] Martyn *v.* Williams, 1 H. & N. 817; Norval *v.* Pascoe, 34 L. J. Ch. 82. In Martyn *v.* Williams, a covenant to repair works was held to be infringed by not repairing certain pit-pans and levels: see p. 826.

[6] Norval *v.* Pascoe, *u. s.*

[7] See Ward *v.* Day, 4 B. & S. 358.

[8] Roberts *v.* Davey, 4 B. & Ad. 664, 672.

[9] Doe *v.* Wood, 2 B. & Al. 740.

[10] *Ante*, p. 241.

[11] Roberts *v.* Davey, *u. s.*, 664, 671, 672.

[12] Muskett *v.* Hill, 5 Bing. N. C. 694; S. C. 7 Scott, 855.

his intention to avoid the grant; and cannot, without doing such act, treat the licensee as a mere trespasser. He may not, it is true, be able to actually enter, as in the case of a lease; or to do more than give notice of the avoidance. But such notice he should give.[1] And, independently of those provisions, whatever may be the terms of a proviso for re-entry, they should be strictly pursued. Where the proviso was, that the grantor might, on breach of covenant, avoid the grant by giving the licensee notice of the avoidance; and the notice actually given was, that, unless the covenant was thenceforth observed, the grant would be avoided; it was held, that this was an insufficient notice.[2] And the provisions of the Act 44 & 45 Vict. c. 41, restricting the right of forfeiture,[3] apply to mining licenses; a "mining lease" under the Act including a license.[4] And the acts of the grantor may show an intention on his part to waive a forfeiture. And where a grantor attempted (although illegally) to levy a distress, and afterwards entered into negotiations to grant a new license on the expiration of the existing one, it was held, that such an intention was sufficiently shown.[5] However, the exercise of a right of re-entry may sometimes be inferred from the acts of the grantor, where those acts would otherwise have been wrongful.[6] For a wrongful re-entry the licensee may bring an action.[7]

e. Construction of Doubtful Instruments.

In *Daniel* v. *Gracie*,[8] the proprietor of a house and of a marl pit and brick mine demised the house by an unwritten agreement to the plaintiff from a day named; and it was at the same time agreed without writing, that the plaintiff should take the marl pit and the brick mine, and should pay quarterly, at the

Grant held to create lease.

[1] Roberts *v.* Davey, 4 B. & Ad. 664, 671, 672.

[2] Muskett *v.* Hill, 5 Bing. N. C., 694.

[3] See *ante*, pp. 241, 242.

[4] See *ante*, p. 160, n. [1].

[5] Ward *v.* Day, 4 B. & S. 337 : 5 *ib.* 359.

[6] Doe *v.* Wood, 2 B. & Al. 724.

[7] *Ib.* Muskett *v.* Hill, *u. s.* In Scotland a licensee, who had been made liable for flooding an adjoining mine, was held disentitled to an indemnity from his licensor; but it was intimated, that, if he had been a lessee, his position might have been different: Brand *v.* Bell's Trustees, 11 Sess. Cas. (3rd Ser.) 42.

[8] 6 Q. B. 145.

usual quarter days, 8*d.* per solid yard for all the marl that he got, and 1*s.* 8*d.* per thousand for all the bricks that he made. It was held, that the agreement for the marl pit and the brick mine was a demise from year to year.[1]

Grants held to create licenses.

On the other hand, in *Cheetham* v. *Williamson*,[2] a covenant with, and grant to, a person, that it should be lawful for him, his heirs and assigns, at all times to enter upon certain lands to search and dig for coal, and to take and carry away the same to his and their own use, was held to create a license only. And the mere fact that, by the same instrument, the licensor had derived his interest from the licensee, was held immaterial so far as respected the construction of the instrument.[3] So in *Doe* v. *Wood*.[4] There a grant was made to A., his partners, fellow-adventurers, executors, administrators, and assigns, of free liberty to dig for tin and all other metals throughout certain lands, and to raise and dispose of the same to their own use, and to make adits, &c., necessary for the exercise of that liberty; excepting to the grantor liberty to drive any new adit within the lands "granted," and to convey any watercourse over the premises "granted;" *habendum* for twenty-one years. The grantee covenanted to pay rent, rates, and taxes; and to work the mines during the term. It was held, that the grant was not a lease, but only a license.[5] And, in the case of a grant for a term, the mere reservation of a right of re-entry to the grantor on breach of covenant by the grantee will not suffice to convert what would otherwise be a license into a lease.[6]

Other difficulties of construction.

In *Haigh* v. *Jaggar*[7] there was a bargain and sale of the coal under certain closes to three people, their executors, administrators, and assigns; with provisions, that, from and after the commencing of the digging and sinking any pit or shaft for the sale of the coal, the grantees should have liberty of getting, selling, winning, and working, for any term of years computed

[1] Cf. Stoughton *v.* Leigh, 1 Taunt. 402, 409.

[2] 4 East, 469.

[3] See also Mountjoy's Case, Godb. 17; 1 And. 307; Moor, 174.

[4] 2 B. & Al. 724.

[5] See also Norway *v.* Rowe, 19 Ves. 158; Muskett *v.* Hill, 5 Bing. N. C. 706, 707; and cf. Kittow *v.* Liskeard, L. R. 10 Q. B. 7, 13.

[6] Doe *v.* Wood, 2 B. & Al. 724. A proviso for re-entry is frequently inserted in a license: *ante*, p. 254. Cf. L. & N. W. R. Co. *v.* Buckmaster, L. R. 10 Q. B. 444, 447.

[7] 16 M. & W. 525; 3 Exch. 54.

from the time when they should begin to sink, until six acres of coal should be gotten; that at the expiration of twelve years the coal should be measured, and if six acres should not be then gotten there should be liberty to get the ungotten portion of the six acres; and when six acres were gotten there should be liberty to get the remainder; *habendum* for twelve years from the 2nd Feb., 1805. It was intimated, that the instrument operated as a demise for twelve years from the 2nd Feb., 1805, and as a license after that time. However, in *Low Moor Co.* v. *Stanley Iron Co.*,[1] a bargain and sale of unopened mines to a person, his executors, administrators, and assigns; not followed by enrolment or by livery of seisin, but followed by possession; was held, in disregard of *Haigh* v. *Jaggar*, to create neither a lease nor a license, but only a tenancy at will.[2] In *Atkinson* v. *King*[3] a grant in these words, "I agree to allow you to sink pit for coal in B. at 1*s.* 6*d.* per ton, and not to allow any one to sink on any coal you prove in the pit," was said to be a license.[4] In *Ex parte Hankey*,[5] A. entered into an agreement with B., authorising him during the then present year to dig earth and make bricks on two pieces of land, on payment of specified sums varying according to the quantity of the bricks to be made. It was held, that B.'s estate was a lease for a year. In *Re Stroud*,[6] A. agreed to let and B. to hire land and premises at a fixed surface rent for the purpose of brick-making. B. was to pay 3*s.* per thousand for the bricks, and to make at least 4,000,000 a year, or pay rent equal thereto; and he was not to excavate beyond the depth of eight feet without special license. It was held, that B.'s estate was either a tenancy at will or from year to year.

f. Stamps.

Stamps. A license to get minerals of the Duchy of Cornwall for a period not exceeding one year is exempt from stamp duty.[7]

[1] 34 L. T. N. S. 186. In the Court below (33 *ib.* 436) Haigh *v.* Jaggar (*ante*, p. 256) was followed.

[2] This was at law. In equity the interest of the grantee would have been different.

[3] Ir. Rep. 11 C. L. 540, *per* May, C.J.

[4] The dictum was dissented from by Christian, L.J., in the Court of Appeal (2 L. R. (Ir.) 346, 350).

[5] 1 Mont. & M. 247.

[6] 8 C. B. 502.

[7] 7 & 8 Vict. c. 65, s. 43. An equitable assignment of a license did not formerly require a stamp: see Harker *v.* Birkbeck, 3 Burr. 1563.

CHAPTER XIII.

BANKRUPTCY AND DEATH AND CONSEQUENT DEVOLUTION.

a. Bankruptcy—Dissolution of Partnership—Devolution.

Bankruptcy generally dissolves partnership.

THE bankruptcy of any partner in the working of an ordinary mine or quarry, whether he is a partner in the land itself also, or a mere co-owner of the land, operates, it is conceived, as a dissolution of the partnership. And, if any subsequent working is carried on between the old partner and the trustee, it is, it is conceived, by virtue of a fresh partnership arrangement. There are, no doubt, authorities declaring that, in this respect, mining partnerships differ from other kinds of partnership.[1] But, unless these authorities are taken to apply to cost-book mines,[2] they cannot, it is conceived, be considered law.[3]

Devolution.

It is impossible for two or more partners in a mine or quarry to defeat the policy of the bankrupt laws by providing, that, on the bankruptcy of any of them, his trustee shall not be entitled to his interest in the land, but only to his interest in the assets other than the land.[4]

b. Bankruptcy—Trading.

Person working mine or quarry not necessarily trader within Irish Bankruptcy Act.

A person, who works mines or quarries, may be a trader in the sense that mining operations have always been regarded as a species of trade.[5] He may not, however, necessarily be a trader within the meaning of the Bankr. (Ir.) Am. Act, 1872;[6]

[1] Fereday *v.* Wightwick, 1 R. & My. 49; *Ex parte* Broadbent, 1 M. & A. 638. See *ante*, p. 137, n. [4].

[2] See *post*, Chap. XIX., Sect. 4, *a*, (α); *c*, (α), (β).

[3] See Jefferys *v.* Smith, 3 Russ. 167. Cf. Tatam *v.* Williams, 3 Ha. 355.

[4] Whitmore *v.* Mason, 2 J. & H. 204.

[5] See *ante*, p. 57, n. [2], and cases there cited.

[6] 35 & 36 Vict. c. 58.

and it may be important to determine under what circumstances he is or becomes a trader within the meaning of that Act.

The Act itself[1] includes in its specification of traders alum-makers,[2] brickmakers,[3] and limeburners.[4] Alum makers—brick-makers—lime burners.

The Act also includes "persons who . . . . . seek their living by buying and selling . . . . . goods or commodities, or by the workmanship or conversion of goods or commodities."[5] The owner of a phosphate mine, who sells the phosphate, is not within this description.[6] Nor is a person who digs stones from his own quarry, and sells them;[7] although he may become so by purchasing stones from others, if the purchase is on an extensive scale, and he intends to carry on a trade.[8] Nor is a person who works a coal-mine, and sells the coal, within the description in question; whether he has acquired the mine for Phosphate mine. Stone quarry. Coal mine.

[1] S. 4; 20 & 21 Vict. c. 60, s. 90.

[2] An alum-maker was formerly held to be a trader, or not, according as he manufactured independently as a trade, or merely manufactured as a mode of enjoying the profits of his land: see Newton *v.* Newton, 2 Wils. 170; Port *v.* Turton, *ib.* 172; Watkins *v.* Caddel, 1 B. C. C. 176; Wells *v.* Parker, 1 T. R. 38; Parker *v.* Wells, 1 B. P. C. 545; Sutton *v.* Weeley, 7 East, 447; *Ex parte* Burgess, 2 Gl. & J. 200.

[3] A brickmaker was formerly held to be a trader, if he purchased or rented land, and manufactured bricks thereout for public sale as an independent trade (*Ex parte* Harrison, 1 B. C. C. 173; Wells *v.* Parker, *u. s.*, 34; Parker *v.* Wells, *u. s.*; Sutton *v.* Weeley, *u. s.* 448; *Ex parte* Burgess, *u. s.* 199; Heane *v.* Rogers, 9 B. & C. 590); or if the produce of his land was merely the raw material of a manufacture, and was used as such (Wells *v.* Parker, *u. s.*); or if he purchased the materials of his manufacture (*Ex parte* Gallimore, 2 Rose, 424). But he was not held to be a trader, if he merely manufactured as the most beneficial means of enjoying the profits of his land (*Ex parte* Harrison, *u. s.*; Wells *v.* Parker, *u. s.*; Parker *v.* Wells, *u. s.*; Sutton *v.* Weeley, *u. s.*, 442; *Ex parte* Gallimore, *u. s.*; *Ex parte* Burgess, *u. s.*; Heane *v.* Rogers, *u. s.*; Paul *v.* Dowling, 3 C. & P. 500); whether he had a freehold or a leasehold interest therein (*Ex parte* Gallimore, *u. s.*; *Ex parte* Burgess, *u. s.*; *Re* Cleland, 2 Ch. 469); and notwithstanding that various ingredients were used, and that by the manufacture the earth was changed into a totally different substance (Sutton *v.* Weeley, *u. s.*, 447). And manufacturing generally for sale did not, of itself, constitute him a trader, if he had acquired the land by gift or devise (Sutton *v.* Weeley, *u. s.*, 446, 447. See, however, Wells *v.* Parker, *u. s.*, 40).

[4] The same distinction was formerly held to prevail in the case of lime-burners, as in the case of alum-makers (as to which see *supra*, n. [2]): see Sutton *v.* Weeley, *u. s.*, 447; *Ex parte* Ridge, 1 Rose, 316; *Ex parte* Burgess, *u. s.*, 200; Paul *v.* Dowling, *u. s.*

[5] S. 4; 20 & 21 Vict. c. 60, s. 90.

[6] *Ex parte* Schomberg, 10 Ch. 172.

[7] *Ex parte* Gardner, 1 Rose, 377: see also *Ex parte* Burgess, *u. s.*, 200. Cf. Steward *v.* Blakeway, 6 Eq. 481.

[8] *Ex parte* Gardner, *u. s.*

that very purpose, or not.[1] And the mere facts of his buying articles, and selling them to his own pitmen, will not constitute him a trader.[2] But if he procures a particular species of coal from elsewhere on an extensive scale, to sell with his own, and so render his own marketable; and sells them together; he becomes a trader.[3] For, in such a case he both buys and sells.[4]

Salt mine.

A person who takes a lease of salt-works and brine-pits for the purpose of manufacturing salt out of the springs and rock salt on the demised premises, and who manufactures salt accordingly, and sells it, is not within the description; although these several acts are done in conjunction with another person, and for

Slate quarry.

the common benefit.[5] Nor is a person, who becomes the lessee of a quarry, and works it up into slates for sale, within the description.[6] And he is not brought within it by merely selling tools and gunpowder to his workmen.[7] And, of course, he is not brought within it by a single act of selling spare iron to a

Iron mine—lead mine.

builder to be used in buildings on the premises.[8] Nor is a person, who smelts iron or lead ore from his own mines into pig iron, and sells it, within the description; although various ingredients are used in the smelting, and by the smelting an essentially different substance is produced.[9] But where a person not merely raises iron ore from his own mine, but purchases other iron ore on a large scale, and manufactures and sells both, he becomes a trader.[10] And if the ore bought is to the ore raised in such a proportion as that of 65 or 70 to 35 or 30 per cent., the buyer becomes a trader; notwithstanding that the ore bought may have been bought for the purpose of making the ore raised a marketable commodity.[11] Where the lessee of an iron mine purchased large quantities of pig iron, which he

[1] Port *v.* Turton, 2 Wils. 169; Wells *v.* Parker, 1 T. R. 38; on appeal, Parker *v.* Wells, 1 B. P. C. 545; *Ex parte* Broadbent, 1 M. & A. 640; Anon. Fonbl. Bk. R. 251.

[2] *Ex parte* Gallimore, 2 Rose, 424.

[3] Port *v.* Turton, *u. s.*, 170; *Ex parte* Gallimore, *u. s.*

[4] See and consider Anon. Fonbl. Bk. R. 251. Cf. Sutton *v.* Weeley, 7 East, 448.

[5] *Ex parte* Atkinson, 1 M. D. & De G. 300.

[6] *Re* Cleland, 2 Ch. 466. Cf. Kent *v.* Astley, L. R. 5 Q. B. 19, 25.

[7] *Re* Cleland, *u. s.* Cf. *Ex parte* Gallimore, *u. s.*

[8] *Re* Cleland, *u.s.*

[9] See Watkins *v.* Caddel, 1 B. C. C. 176; Sutton *v.* Weeley, *u. s.*, 447.

[10] See Watkins *v.* Caddel, *u. s.*, 178; Crawshay *v.* Maule, 1 Swanst. 523, 528. Cf. Wells *v.* Parker, *u. s.*, 34, 39.

[11] Turner *v.* Hardcastle, 11 C. B. N. S. 683.

manufactured into cast iron implements for the purpose of working the mine; and sold to persons in the neighbourhood the surplus of the cast iron, which he did not require to use; whether he was a trader or not was held to be a question of his intention.[1]

Result of law.

The result of the law may be expressed as follows:—

(1.) Alum-makers, brickmakers, and lime-burners, are traders.

(2.) Subject to this, the mere fact, in the case of any mine or quarry, that it has been purchased or taken on lease for the purpose of working it, and selling the produce, does not constitute a trading.[2]

(3.) Nor does the mere fact that, by the working, a different substance is produced.

(4.) Nor do the mere facts that the mine or quarry belongs to, and the working is conducted by, two or more persons in conjunction.[3]

(5.) Nor do the mere facts of purchases being made on a small scale of other produce to sell with, and make marketable, the produce of the working, and of sales of them being made together.[4]

(6.) But it is otherwise, if the purchases of other produce are made on an extensive scale.

(7.) Whether or not there is a trading may, in doubtful cases, depend on whether the land is ancillary to the manufacture, or the manufacture to the land.[5]

England.

Similar considerations applied in England under the Bankruptcy Act, 1869.[6] But the Bankruptcy Act, 1883, abolished the distinction in England between traders and non-traders.

[1] *Ex parte* Salkeld, 3 M. D. & De G. 125.

[2] See *Re* Cleland, 2 Ch. 469.

[3] This was doubted in Crawshay *v.* Maule, 1 Swanst. 518, 523.

[4] See and consider *ib.* 523.

[5] See *Ex parte* Harrison, 1 B. C. C. 178; Wells *v.* Parker, 1 T. R. 34. Cf. Crowther *v.* Thorley, 31 W. R. 564. There the rules of a building society provided, that upon the conveyance of land by the society to its members, the mines should be reserved to the trustees of the society, who should have "full power to sell lease get or win" the minerals as they should think best, for the benefit of the members. It was held, that the winning of the minerals was not merely subsidiary to the main object of the society; that it was a carrying on of a business; and that the society was, therefore, within s. 4 of the Comp. Act, 1862.

[6] See s. 4; sch. 1.

c. Death—Dissolution of Partnership.

Death generally dissolves partnership.

The death of any partner in an ordinary mine or quarry operates, it is conceived, as a dissolution of the partnership.[1]

d. Death—Devolution.[2]

(*a*) *Mine or Quarry.*

Dower.

Dower may be due of mines or quarries wrought during the coverture.[3] And it is immaterial, in order that a right of dower may accrue, whether the mines or quarries were wrought by the husband, or by lessees for years under him; or whether such lessees paid pecuniary rents, or rents in kind; or whether the mines were under the husband's own lands, or under the lands of another person, if the husband had obtained from such other person (not a mere license, but) a grant to take the whole stratum.[4] Dower cannot be due of mines or quarries unopened[5] during the coverture; whether under the husband's own lands, or under the lands of others; and whether such mines or quarries were left unopened by the husband, or by his lessees.[6]

Assignment of dower.

Dower may be assigned of mines or quarries either collectively with other lands, or separately of themselves.[7] It should, it has been said, be assigned by metes and bounds, if practicable: otherwise either by a proportion of profits, or by separate alternate enjoyment of the whole for short proportionate periods.[8] In assigning dower an estimate should be made of the annual value of the open[5] mines or quarries as part of the value of the estates of which the widow is dowable.[9] But it is not necessary to assign any of the open[5] mines themselves, or any portions of them. The third part in value to be assigned may

[1] Notwithstanding the dictum to the contrary in Fereday *v.* Wightwick, 1 R. & My. 49. See Tatam *v.* Williams, 3 Ha. 355. Cf., as to bankruptcy, *ante*, p. 258. See also *ante*, p. 137, n. [4].

[2] It has always been necessary, that a will of mines should be executed with the same formalities as a will of surface property: see Port *v.* Turton, 2 Wils. 172. For the form of an order in an administration action for the appointment of a receiver and manager of a testator's mines, see Shale *v.* Hodson, Crockford *v.* Salmon, Set. 420.

[3] Stoughton *v.* Leigh, 1 Taunt. 402.,

[4] *Ib.*

[5] As to open and new mines or quarries, see *ante*, pp. 22 *et seq.*

[6] Stoughton *v.* Leigh, *u. s.*

[7] *Ib.*

[8] *Ib.*

[9] *Ib.* 410: see also Hoby *v.* Hoby, 1 Vern. 218.

consist wholly of land set out by metes and bounds, and containing none of the open[1] mines. Or any of the mines themselves may be included in the assignment; being specifically described, if the particular lands in which they lie are not also assigned. Or the enjoyment and perception of the profits of any of the particular mines may be divided.[2] However, at the present day dower is hardly ever actually assigned.

Real and personal representatives—minerals.

It need hardly be said, that minerals when unsevered are part of the mine or quarry containing them, and devolve with it, and not as pure personal estate.[3]

Co-owner.

On the death of any tenant in common or coparcener of a mine or quarry, his or her share devolves as real, and not as personal, estate.[4]

Partner in working.

On the death of any partner in the working of a mine or quarry, who is a mere co-owner of the land itself, his share devolves as real, and not as personal, estate.[5] While, however, this is quite clear as a principle, its application to a particular state of facts often gives rise to difficulties. The parties may, for example, by the nature of their operations, leave it in doubt, whether they have not constituted themselves partners in, and altered their relations as mere co-owners of, the land. Where any such doubt arises, the test for resolving it is to be found in the answer to the question, Have the parties treated their operations as ancillary to the land, or the land as ancillary to their operations? In the former case, their relations as co-owners of the land will not have been altered. In the latter, they will. Quarrying will frequently be found to come under the former case. Such an operation as digging out iron ore, and turning it into iron bars, will usually be found to come under the latter.[6] If two or

[1] As to open and new mines or quarries, see *ante*, pp. 22 *et seq.*

[2] Stoughton *v.* Leigh, 1 Taunt. 410, 411.

[3] Port *v.* Turton, 2 Wils. 172.

[4] See Steward *v.* Blakeway, 6 Eq. 481, 482, *per* Lord Romilly.

[5] *Ib.*

[6] *Ib.* 481, *per* Lord Romilly: see also Davies *v.* Games, 12 Ch. D. 813, and cases there cited. Cf. the distinction between the case where land being the separate property of one person becomes, on his entering into partnership with another, the property of the firm, and the case where it continues to be the property of the original owner, as illustrated by Hills *v.* Parker, 7 Jur. N. S. 833; and Burdon *v.* Barkus, 3 Giff. 412; 4 De G. F. & J. 42. For the test, whether a share in a mining concern is, or is not, an interest in land within the 4th sect. of the Statute of Frauds, see *ante*, pp. 184, 185.

more persons are co-owners of land, and carry on a trade as ancillary to it, and out of the undivided profits of the trade purchase other land, the purchased land will, on the death of one of them, devolve as real, not as personal, estate.[1] The share of an ordinary partner in a mine or quarry devolves, *primâ facie*, as personal estate.[2] But, of course, his interest in land will, in case an intention to that effect be clearly indicated, devolve as real estate.[3]

Ordinary partner.

Where mines or quarries are vested in trustees for a partnership or company in trust for the individual members in proportion to their shares, and not in trust for the undertaking generally, the interest of each member is an interest in the land, and cannot be bequeathed to a charity.[4] However, where mines or quarries are vested in trustees for a partnership or company in trust for the undertaking generally, and not for the individual members in proportion to their shares,[5] a bequest of his interest by any member is not obnoxious to the Mortmain Acts.[6] Thus, in *Hayter* v. *Tucker*,[7] a testator bequeathed his residuary personal estate to a charity. Part of the estate consisted of shares in various mining undertakings.[8] It was in evidence, that leases of the mines in question had been granted to trustees for the undertakings; and that the shareholders had no interest in the mines themselves, but only in the profits of the working. It was held, that the charity was entitled. And, in such a case, it is apparently immaterial, whether the substantial object of the concern is a dealing with land, or whether the land is merely ancillary to a trading independent of it. *Morris* v. *Glynn*[9] is, no doubt, a decision to the contrary. In that case a testatrix was at the time of making her will possessed of fifteen shares in a concern, the business of which consisted of manufacturing iron obtained

Mortmain Acts—trust for individuals.

Trust for undertaking.

[1] Steward *v.* Blakeway, 6 Eq. 479; 4 Ch. 603.

[2] Crawshay *v.* Maule, 1 Swanst. 508; Steward *v.* Blakeway, 6 Eq. 481.

[3] See Balmain *v.* Shore, 9 Ves. 500.

[4] See Hayter *v.* Tucker, 4 K. & J. 243, 246; Entwistle *v.* Davis, 4 Eq. 272.

[5] As to the effect of which, see *ante*, pp. 184, 185.

[6] Hayter *v.* Tucker, *u. s.*

[7] 4 K. & J. 243.

[8] They were conducted on the cost-book system, but this is immaterial.

[9] 27 Beav. 218.

from its own estates. These estates were vested in trustees in trust for the purposes of the company; but it could not be disputed, that the land was not held as merely ancillary to an ordinary trading purpose. The testatrix bequeathed the shares to a charity; and it was held, that the gift was invalid. *Morris* v. *Glynn* has, however, since been expressly dissented from[1]; and it can hardly now be considered law.[2] Shares in Irish, or Scotch, or foreign mines, are not within the policy of the Mortmain Acts.[3] And shares in companies registered under the Comp. Act, 1862, are personal estate.[4]

Irish or Scotch or foreign mines—companies under Comp. Act, 1862.

(β) *Renders.*

In *Barrs* v. *Lea*,[5] certain sums payable half-yearly, and described as "further consideration money," and depending on the rate of working the demised mines, were, in addition to an annual surface rent, reserved to the lessor, his heirs and assigns. It was held, that, as between the real and personal representatives of the lessor, these sums were in the nature of rent, and passed to the heir. However, in *Hatherton* v. *Bradburne*,[6] A., being the owner of mines, executed a deed, by which he "sold and disposed of, and granted and conveyed" them to B. for 99 years, subject to the payment to the owner, his "executors, administrators," and assigns, of £7998 by instalments extending over the first twelve years. On non-payment, power was given to A., his "executors, administrators," and assigns, to distrain and re-enter; and provisions were made for the consequent avoidance of the grant, and for relieving A., his "heirs, executors, or administrators," from any liability to repay any part of the "purchase-money" for the "minerals" sold. The deed also enabled B. to become the tenant of the surface at a rent extending over the whole period; and this rent and an incidental power of distress were reserved to A., his "heirs and assigns." It was held, that the unpaid instalments of the £7998 were not in

Real and personal representatives.

[1] See Entwistle *v.* Davis, 4 Eq. 272.

[2] Cf., as to one of the tests of a trading, *ante*, p. 261.

[3] Baker *v.* Sutton, 1 Keen, 234. For the form of the order, see *ib.*; Set. 591.

[4] S. 22.

[5] 33 L. J. Ch. 437.

[6] 13 Sim. 599.

the nature of rent, but constituted a personal debt owing by the lessees.

Heir and remainderman.

Ore is analogous to money, and a reservation of ore or toll will go to the remainderman as money, although made payable to the lessor, his heirs and assigns.[1]

Apportionment Act.

The Apportionment Act, 1870,[2] applies to rents or royalties reserved at fixed periods.[3] But it does not apparently apply to royalties payable at uncertain times, and depending upon acts within the will and pleasure of the party who is to pay; such as royalties payable upon a sale of the produce of the mine or quarry.[4]

Mortmain Acts.

Mining rents and royalties are personalty, not realty, for the purposes of the Mortmain Acts.[5]

(γ) *Minerals or their Proceeds.*

Minerals or their proceeds.

Where the tenant for life of a settled mine or quarry, in the exercise of his right, works it, the minerals, which by the working he has converted into chattels, devolve, on his death, on his personal representative, and not on the remainderman;[6] the tenant for life having made them his absolute property.[7] As

[1] Campbell *v.* Leach, Amb. 748: see also Basset *v.* Basset, *ib.* 843.

[2] 33 & 34 Vict. c. 35.

[3] See Llewellyn *v.* Rous, 2 Eq. 27, a decision under 4 & 5 Will. 4, c. 22.

[4] St. Aubyn *v.* St. Aubyn, 1 Dr. & Sm. 611. This was a decision under 4 & 5 Will. 4, c. 22, the language of which is rents, annuities, and other payments "made payable or coming due at fixed periods." The language of the Act of 1870 (33 & 34 Vict. c. 35, s. 2), is different; being "rents, annuities, dividends, and other periodical payments in the nature of income." But "periodical payments" would probably receive the same construction as "payments at fixed periods." See, however, Sct. 1267. As to apportionment in Scotland between an heir and an executor, see Weir *v.* Durham, 8 Sess. Cas. (Ser. 3), 725. The proper principle, on which an apportionment of rent should be made, where a man dies intestate, having been the owner in fee of a mine, and the lessee for a term of the overlying surface; and either property is valueless without the other; and the heir-at-law and administrator are desirous that both properties should be let together to the same tenant; is to assume the mine and the surface to have always been differently owned, and then to calculate what rent the mine owner would have to pay for the use of the surface: see Guest *v.* East Dean, L. R. 7 Q. B. 342; Kittow *v.* Liskeard, 10 *ib.* 13. Cf. Ley *v.* Ley, 6 Eq. 174.

[5] Brook *v.* Badley, 4 Eq. 106.

[6] Stuart *v.* Bute, 1 Dow, 86.

[7] See *ante*, pp. 46, 55. See Port *v.* Turton, 2 Wils. 172.

has been already seen,[1] where mines or quarries belonging to a lunatic tenant in fee simple are sold, partitioned, or exchanged, the moneys received in respect thereof, so far as they have not been applied for the benefit of the lunatic, are, on his death, considered as real estate.

(δ) *Fixtures and Moveable Effects.*

Fixtures and moveable effects.

Salt pans erected for the purposes of salt works by a tenant in fee simple, which were removeable, have been held to go to the heir, and not to the executor; the salt works having been necessary for the enjoyment of the inheritance.[2] It has, however, been held, that, where a tenant for life or in tail erects a fire engine to work his colliery, it will, on his death, devolve as personalty, and not go with the estate to the remainderman; a colliery having always been considered as a species of trade.[3] The question, whether such articles as materials laid down for making waggon-ways, or such articles as fire-engines, are fixed to the freehold, and pass therewith to the heir or remainderman; or go to the personal representative of the party erecting them; will sometimes be determined by the custom of the district in question.[4]

[1] *Ante*, p. 128.

[2] Lawton *v.* Salmon, 1 H. Bl. 259 n.

[3] Lawton *v.* Lawton, 3 Atk. 13, 16; Dudley *v.* Warde, Amb. 112, 114: see also *ante*, p. 57, n. [2], and other cases there cited. See Wake *v.* Hall, 8 App. Cas. 195, 210.

[4] See Lowther *v.* Cavendish, 1 Eden, 99, 118. An inquiry on the subject will, if necessary, be directed, *ib.* As to buildings and machinery erected under the Derbyshire customs, see Wake *v.* Hall, *u. s.*, 195, 216; *post*, Chap. XXI., Sect. 1, *d.* As to Scotch law, see Bain *v.* Brand, 1 App. Cas. 762.

CHAPTER XIV.

NEIGHBOURS—GENERAL PRINCIPLES—NUISANCES—USER OF SURFACE OR SUBSOIL.

Sect. 1.—GENERAL PRINCIPLES.

Generally.

It has been seen, that, where mines subjacent to a surface, and the surface, are differently owned; whether such ownership has always been separate, or the separation has been effected by some instrument of severance; the mines and the surface are separate tenements, and possess all the incidents of separate ownership.[1] Of course, the same principle applies, where an underlying and an overlying mineral property are differently owned.[2] And, *à fortiori*, it must apply, where mines are differently owned from a laterally adjacent surface; or where two laterally adjacent mineral properties are differently owned. Where any of these states of things exists, it is important to ascertain what the mutual rights and duties of the adjoining owners are.

General principle that a man may use his property as he pleases.

The most general principles applicable to determine the mutual rights and duties of adjoining owners are few and simple. "When anything is granted, all the means to attain it and all the fruits and effects of it are granted also; and shall pass inclusive together with the thing by the grant of the thing itself, without the words *cum pertinentiis*, or any such like words. *Cuicunque aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit.*"[3] Upon a simple grant of mines, therefore, the power to dig them is granted;[4] and in all other respects everything which is necessary for the fair and reasonable

[1] See *ante*, pp. 27, 67.

[2] See and consider Mundy *v.* Rutland, 23 Ch. D. 81, 89, 96.

[3] Shep. Touch. 89.

[4] *Ib.*; Rowbotham *v.* Wilson, 8 E. & B. 149; 8 H. L. C. 360; Smith *v* Darby, L. R. 7 Q. B. 722; Ramsay *v.* Blair, 1 App. Cas. 703; Pountney *v.* Clayton, 31 W. R. 666.

enjoyment of the thing granted passes. And where, instead of mineral property being granted, it is excepted from a conveyance of land, the same principles apply. For "what will pass by words in a grant will be excepted by like words in an exception."[1] And where it is not known, whether mineral property has been the subject of grant or of exception, but it is merely known that its ownership is in fact distinct from the ownership of adjoining property, similar principles apply. For it is a rule, that a man may, in general, use his property as he pleases, and make the most of it.[2] "The general rule of law in both countries[3] is, that the owner of one piece of land has a right to use it in the natural course of user, unless in so doing he interferes with some right created either by law or contract. And, as a branch of that law, the owner of the minerals has a right to take away the whole of the minerals in his land, for such is the natural course of user of minerals; and a servitude to prevent such an user must be founded on something more than mere neighbourhood."[4] It is, however, on the other hand, a clear rule, as expressed in the maxim *sic utere tuo ut alienum non lædas*, that a man must not, in the user of his property, do an *injuria* to his neighbour.[5] Where the two principles conflict, the question arises, Which principle shall prevail?

General principle that a man must not injure his neighbour.

Conflict of two principles.

SECT. 2.—NUISANCES.

(a) *Generally.*

The owner of works carried on for profit by his agents is liable to be indicted for a public nuisance caused by acts of his workmen in carrying on the works; although done by them without his knowledge, and contrary to his general orders.[6]

Obstructing navigation.

[1] Shep. Touch. 100; Cardigan *v.* Armitage, 2 B. & C. 207; Goold *v.* G. W. Deep Coal Co., 12 L. T. N. S. 844.

[2] See Crompton *v.* Lea, 19 Eq. 126: see also Rylands *v.* Fletcher, L. R. 3 H. L. 338.

[3] England and Scotland.

[4] Wilson *v.* Waddell, 2 App. Cas. 99, *per* Lord Blackburn.

[5] See Harris *v.* Ryding, 5 M. & W. 73; Rowbotham *v.* Wilson, 8 H. L. Cas. 360; Smith *v.* Darby, L. R. 7 Q. B. 723; Eadon *v.* Jeffcock, L. R. 7 Ex. 387, 396; Crompton *v.* Lea, *u. s.*

[6] R. *v.* Stephens, L. R. 1 Q. B. 702.

This principle has been applied against the owner of a quarry whose workmen threw the rubbish from the quarry into a river, whereby the navigation was obstructed.[1]

Sinkings or erections near highways.

Persons are bound under penalties not to sink pits, or erect steam-engines, gins, or other like machinery, within twenty-five yards from any part of a carriage-way or cart-way; unless screened therefrom, so as not to be dangerous to passengers, horses, or cattle.[2]

Fencings near highways.

If an excavation is made so near to a highway as to amount to a public nuisance, and a private injury ensues, an action will lie.[3] However, the owner of an unfenced quarry, which adjoins a public road, but is not so near as to be dangerous to persons using the road in the line of the road, is under no liability to a person who deviates from the road and falls into the quarry.[4]

(β) *Brick-burning.*

No right to burn bricks, if nuisance created.

A man has no right to burn bricks on his land, although made of his own clay, if a nuisance would be thereby created.[5] And he cannot justify the nuisance by saying, that it is done at a convenient time and place, and is a reasonable user of the land; or is *pro bono publico*.[6] However, the question, whether a nuisance is created, is one of fact in each particular case. It is not, for instance, a question of mere proximity. Burning bricks within 48 yards,[7] or 60 yards,[8] or 180 yards,[9] or 200 yards,[10]

But nuisance is a question of fact.

[1] R. *v.* Stephens, L. R. 1 Q. B. 702.

[2] 5 & 6 Will. 4, c. 50, s. 70.

[3] Barnes *v.* Ward, 9 C. B. 392: see also Hounsell *v.* Smyth, 7 C. B. N. S. 731.

[4] Hounsell *v.* Smyth, *u. s.* Cf. Blyth *v.* Topham, Cro. Jac. 158. As to the liability of surveyors of highways, in exercising statutory rights of digging materials for roads, to fill up or fence off pits, see *ante*, pp. 105, 106. See, further, as to neglect to fence excavations, *infra*, Sect. 3, *c.* (β).

[5] Walter *v.* Selfe, 4 De G. & Sm. 315, 324; Pollock *v.* Lester, 11 Ha. 266; Bamford *v.* Turnley, 3 B. & S. 62.

[6] Walter *v.* Selfe, *u. s.*; Bamford *v.* Turnley, *u. s.*; Cavey *v.* Ledbitter, 13 C. B. N. S. 470; Shotts Iron Co. *v.* Inglis, 7 App. Cas. 528, 543; overruling Hole *v.* Barlow, 4 C. B. N. S. 334. See also Beardmore *v.* Tredwell, 3 Giff. 683.

[7] Walter *v.* Selfe, *u. s.*, 321.

[8] Pollock *v.* Lester, *u. s.*

[9] Bamford *v.* Turnley, *u. s.*; A.-G. *v.* Tossell, Set. 223.

[10] Barwell *v.* Brocks, 15 Jur. 418 n.

or 240 yards,[1] or even 653 yards,[2] from a house, or pleasure grounds, or a conservatory, has been held to be a nuisance. But, on the other hand, burning bricks within 140 yards from a cottage may not be a nuisance.[3] Nor should the facts of the time and place being convenient, or the fact of the user being reasonable, be wholly disregarded.[4] And brick-making is not necessarily a "noxious or offensive trade, business, or manufacture," within the meaning of s. 112 of the Pub. Health Act, 1875.[5] In each particular case, to create a nuisance, substantial inconvenience and material discomfort must be shown.[6] Where a nuisance is established, the injured party is not precluded from complaining on the mere ground, that there is another nuisance of the same kind in the neighbourhood;[7] or that other persons suffering from the same nuisance do not complain.[8]

Remedies.

Where a nuisance is established, an injunction will, in general, be granted to restrain it.[9] And the mere fact, that a remedy in penalties may be available under the Pub. Health Acts, does not affect the right to have an information at the relation of the Local Board to obtain an injunction.[10] An injunction may also, in general, be had to restrain a threatened nuisance.[11] But it may be proper to refuse an injunction where damages are an adequate remedy.[12] The person who actually

[1] Roberts *v.* Clarke, 18 L. T. N. S. 49.

[2] Beardmore *v.* Tredwell, 3 Giff. 701: see Luscombe *v.* Steer, 15 W. R. 1191.

[3] See Luscombe *v.* Steer, *u. s.*: see Grafton *v.* Hilliard, Amb. 160, n., cited in A.-G. *v.* Cleaver, 18 Ves. 219; and in 4 De G. & Sm. 326.

[4] Luscombe *v.* Steer, *u. s.*, 1192.

[5] See Wanstead Local Board *v.* Hill, 13 C. B. N. S. 479; a decision under the repealed Act, 11 & 12 Vict. c. 63, s. 64.

[6] See Walter *v.* Selfe, 4 De G. & Sm. 315, 322, 325.

[7] *Ib.* 323.

[8] Luscombe *v.* Steer, *u. s.*, 1193.

[9] Walter *v.* Selfe, *u. s.*; Pollock *v.* Lester, 11 Ha. 275; Roberts *v.* Clarke, *u. s.*, 49. The form of the injunction will, if so claimed, be "so as to occasion a nuisance to the plaintiff as the owner or occupier," &c. See Buffy *v.* Stevens; Haywood *v.* Richards, Set. 219. See also Walter *v.* Selfe, *u. s.*, 326. For the form of an order, restraining the burning of bricks other than those actually burning in clamps, and not to continue such burning beyond a week, see Pollock *v.* Lester, *u. s.* And for the form of an order, directing a motion to stand over on the terms of the defendant undertaking not to light any fresh kilns, or rekindle the existing one after it had burnt out, see De Bernus *v.* James, Set. 219.

[10] A.-G. *v.* Tossell, Set. 223.

[11] See Luscombe *v.* Steer, *u. s.*, 1192.

[12] *Ib.* 1193.

Persons liable.

creates a nuisance is not of necessity alone liable. If the owner of land grants a license to burn bricks thereon, and the license is revocable, and the licensee's acts create a nuisance, the licensor, as well as the licensee, may be made liable.[1] But it is otherwise, if he grants a lease or an irrevocable license. For he then parts with all control over the user of the land.[2]

Burning near highways.

Persons are bound under penalties not to make any fire for burning bricks within 15 yards from any part of a carriage-way or cart-way, unless screened therefrom.[3]

(γ) *Iron-calcining, Copper-smelting, Lime-burning, &c.*

Similar principles in case of iron, copper, or lime works, &c.

Similar principles are applicable in the case of iron works,[4] copper works,[5] coke ovens,[6] cement works,[7] and chalk works or lime works.[8] In each of these cases, if a nuisance is shown to exist, an injunction may, in general, be had to restrain it. And it is no objection to an injunction, that the person seeking it has come to the nuisance.[9] But, as in the case of brick-burning, an actual substantial nuisance must be established. Sentimental grievances; or prospective, contingent, or remote, cases of nuisance; will not be allowed to interfere with the great industries of the country: especially where the persons who complain reside in the seats of those industries.[10] And encouragement followed by expenditure may be a bar to a

[1] White *v.* Jameson, 18 Eq. 303. See, as to revocable licenses, *ante*, p. 251.

[2] White *v.* Jameson, *u. s.*: cf. Atkinson *v.* King, 2 L. R. (Ir.), 320. See, further, *infra*, p. 273.

[3] 5 & 6 Will. 4, c. 50, s. 70.

[4] Shotts Iron Co. *v.* Inglis, 7 App. Cas. 518: see the form of the injunction. As to fixing a limitation of distance, see *ib.*, where a mile was fixed.

[5] See Walter *v.* Selfe, 4 De G. & Sm. 324; Bankart *v.* Houghton, 27 Beav. 425; St. Helen's Smelting Co. *v.* Tipping, 11 H. L. C. 642; Tipping *v.* St. Helen's Smelting Co., 1 Ch. 66. For the form of an injunction, see A.-G. *v.* Staffordshire, &c., Co., Set. 219.

[6] Salvin *v.* North Brancepeth Coal Co., 9 Ch. 705.

[7] Umfreville *v.* Johnson, 10 Ch. 580. For the form of an injunction, see A.-G. *v.* Francis, Set. 219.

[8] See Walter *v.* Selfe, *u. s.*; St. Helen's Smelting Co. *v.* Tipping, *u. s.*

[9] Tipping *v.* St. Helen's Smelting Co., *u. s.*

[10] See Salvin *v.* North Brancepeth Coal Co., *u. s.*, 710; Shotts Iron Co. *v.* Inglis, *u. s.*, 543: see also St. Helen's Smelting Co. *v.* Tipping, *u. s.*

remedy, which might otherwise be obtained.[1] But acquiescence in a nuisance, which produces little injury, does not warrant a subsequent extension, which produces great injury.[2] The provisions of the Pub. Health Act, 1875, cannot be invoked to interfere with or obstruct the efficient working of mines; or the processes of smelting ores and minerals; calcining, puddling, or rolling iron, or other metals; or converting pig iron into wrought iron.[3] As in the case of brick-burning,[4] the person who creates a nuisance is not of necessity alone liable. If the owner of a lime quarry demises it, and authorises the lessee to create a nuisance by means of blasting operations and smoke, he is liable as well as the lessee.[5]

Pub. Health Act.

Persons liable.

Persons are bound under penalties not to make any fire for calcining or burning ironstone, limestone, or clay, or making cokes, within fifteen yards from any part of a carriage-way or cart-way, unless screened therefrom.[6]

Calcining, &c., near highways.

SECT. 3.—USER OF SURFACE OR SUBSOIL.

a. Necessary User.

(*a*) *Generally.*

Where mines are severed from the overlying surface, whether by a grant of the land excepting the surface, or by a grant of the land excepting the mines, the mine owner has, it would seem, as incident to the enjoyment, and without any express provision, a right, *primâ facie*, to go upon the surface lands, and dig pits, and get the minerals.[7] And he has, of course, the same right, if it is not known in what manner the severance of his property from the overlying property was effected. *A fortiori*, if a mine owner merely requires a method of communication with his mines for the purpose of working them, he is, for this purpose,

Digging pits and sinking shafts.

[1] Williams *v.* Jersey, 1 Cr. & Ph. 91: see also Bankart *v.* Houghton, 27 Beav. 425.

[2] Bankart *v.* Houghton, *u. s.*

[3] See s. 334. See *Re* Dudley, 8 Q. B. D. 86, 95, 96, 97. Nuisances in respect of water will be considered *post*, Chap. XVII., Parts B and C.

[4] *Ante*, pp. 271, 272.

[5] Harris *v.* James, 45 L. J. Q. B. 545.

[6] 5 & 6 Will. 4. c. 50, s. 70.

See Cardigan *v.* Armitage, 2 B. & C. 207; Durham, &c., Co. *v.* Walker 2 Q. B. 965. But see Harris *v.* Ryding, 5 M. & W. 66, *per* Lord Abinger.

entitled, *primâ facie*, to sink a shaft through the overlying land from the surface to the mines.[1]

Fixing machinery—constructing ponds or sough pits.

Where, upon a severance of surface land from the underlying mines, a liberty to dig pits is expressly granted or reserved, the mine owner will, as incident to the liberty, possess, *primâ facie*, the right to fix such machinery upon the surface as may be necessary, as well to drain the mines, as to draw the minerals from the pits.[2] And if steam engines are necessary for these purposes, their erection cannot be objected to by the surface owner.[3] And if, in such a case, the mine owner has a right to use engines for draining the mines or drawing the minerals from the pits, the construction by him of an engine-house or of a pond upon the surface may not be unlawful.[4] So, where a liberty is granted or reserved of making a sough or drain, the right to make sough pits at any time afterwards for repairing the drain, so long as the original purpose requires it, is impliedly granted or reserved.[5] However, where a liberty has been given of entering on another man's land in order to erect or complete works, the liberty must, *primâ facie*, be exercised once for all; and when the works are erected and completed, the grantee cannot, an indefinite time afterwards, claim the right to go on the land and alter them.[6]

Laying minerals or rubbish on surface.

Where, upon a severance of surface land from the underlying mines, rights of working are expressly granted or reserved, the mine owner will probably, as incident to the granted or reserved rights, possess the right of laying upon the surface the minerals, or the rubbish obtained in working them.[7]

(β) *Voluntary Provisions.*

Invalid liberties.

Where mines were excepted from a conveyance, and certain working powers were reserved; and the exception was itself

[1] See and consider Goold *v.* Great Western Deep Coal Co., 2 De G. J. & S. 600. The principle involved in this case is properly that of a way of necessity, and is more fully discussed *post*, Chap. XVI., Sect. 3. Cf. Blakesley *v.* Whieldon, 1 Ha. 176, 180.

[2] See Dand *v.* Kingscote, 6 M. & W. 174.

[3] *Ib.*

[4] *Ib.* Cf. Wake *v.* Hall, 8 App. Cas. 202, 205, 208, 209, 212, 214, 215 (a case under the Derbyshire customs, *post*, Chap. XXI., Sect. 1, *d.*), where the exercise of somewhat similar rights was held lawful.

[5] Hodgson *v.* Field, 7 East, 613.

[6] See Taylor *v.* St. Helens, 6 Ch. D. 278, 281.

[7] See and consider Cardigan *v.* Armitage, 2 B. & C. 211.

subject to an exception; and the sub-exception was held invalid;[1] it was held, that the mines comprised in the sub-exception could not be worked under the reserved powers, but only under the powers incident to their ownership.[2]

Restrictions as to exercise.

In a case, where a conveyance of land, and of a messuage buildings and a homestead, contained an exception of all mines of coal thereunder; with liberty to enter and sink pits for getting all such coal, and to erect engines and make drains necessary for working the coal, "except as to such lands as lie within 150 yards of the messuage and buildings, and except any homestead;" it was held, that the vendor was entitled to dig coals under the messuage buildings and homestead, and within 150 yards of the same respectively, but was not entitled to sink pits, erect engines, or make drains within 150 yards of the messuage or buildings, or within the homestead.[3]

Compensation for damage.

Difficulties sometimes arise in estimating the compensation for damage occasioned by the exercise of powers exerciseable subject to making compensation. In *Mordue* v. *Durham*,[4] a conveyance of lands in fee was made by the defendants to the plaintiff, with an exception of mines and minerals. The deed gave extensive powers to the defendants to occupy and use the surface for the purpose of working. It also provided, that it should not be lawful for the plaintiff to do or suffer anything to be done, whereby the defendants should be hindered in the exercise of the reserved powers; and that the defendants should compensate the plaintiff for damage or spoil of ground to be occasioned by the exercise of the powers. Previously to the conveyance the premises had been leased to the plaintiff, subject to reservations similar to those in the conveyance; and workings already existed, which had taken place under such reservations. The powers were exercised, and the plaintiff claimed compensation. It was held (1), that the value of the land was estimable with reference to any purpose to which it might reasonably be considered as applicable;[5] (2) that compensation was due in respect of damage arising from the use,

[1] See *ante*, p. 147.

[2] Whidborne *v.* Eccl. Comms., 7 Ch. D. 381.

[3] Bowler *v.* Wolley, 15 East, 444.

[4] L. R. 8 C. P. 336.

[5] See further, as to this, *post*, Chap. XV., Part C., Sect. 1, *b* (ϵ).

subsequently to the conveyance, of land included therein, which had been previously occupied and used for mining purposes; and (3) that no compensation was due in respect of the mere existence of workings in being at the time of the conveyance, or their subsequent user, without any fresh damage.

Assignment of liberties.

In *Cardigan* v. *Armitage*,[1] a liberty was reserved, as incident to an exception of mines from an assurance of part of a manor, to "at all times sink and dig pits, or otherwise to sough and get coals," "and to sell and carry away with carts and carriages, and otherwise to dispose of the same." It was held, that such a liberty might be exercised by a purchaser of the remainder of the manor, although the terms of the reservation were "for the grantor, his heirs and assigns during the time that he and his heirs should continue owners" of such remainder.

Implied liberties not affected by express.

Liberties, which are implied by law as necessary for the due enjoyment of property granted or reserved, will not, unless an intention to that effect is apparent in the instrument of severance, be superseded or curtailed by liberties, which are expressly given. For instance, a liberty specially granted to make two pits for the purpose of repairing a drain will not supersede the right which the law would imply to make other pits for the same purpose.[2] So, such a liberty as that reserved in *Cardigan* v. *Armitage*[1] will not curtail any liberties, to which a grantor is entitled by implication.[3]

(γ) *Statutory Provisions.*

Inclosure Acts.

Where, under the Inclosure Acts, the right to mines and minerals is reserved to the lord of the manor or other person entitled to the soil of the land to be inclosed, with a further reservation to the lord or such other person of a right to enter and work,[4] the person entitled to enter and work may, with his tenants, agents, and servants, and with or without horses or other animals or carriages and materials of all kinds, enter; and break the surface; and search for, work, and carry away the minerals; and make pits, shafts, roads, airways, waterways,

[1] 2 B. & C. 197.

[2] Hodgson *v.* Field, 7 East, 613.

[3] See Cardigan *v.* Armitage, 2 B. & C. 197: cf. Goold *v.* G. W. Deep Coal Co., 2 De G. J. & S. 600.

[4] *Ante*, pp. 154, 155.

engines, and erections; and do all other things, which are necessary or convenient, as well for working as for refining and hewing, and removing water, slag, and rubbish, and accommodating the persons employed; and occupy the land for laying, ordering, and dressing the ores and minerals; and alter the course of streams; and repair and use railroads or other roads.[1] In case it shall be provided, that the compensation to be made for damage through the exercise of the right to enter and work[2] shall be made by the owners of allotments, the person sustaining the damage may complain to two or more justices of the peace; and such justices may inquire into the complaint in a summary manner, and determine the amount of compensation, and order payment thereof.[3] The compensation is payable by the owners of the allotments on whom it shall by the award have been imposed, including the owner of the allotment damaged, by a rate to be assessed upon them in respect of their allotments;[4] and is leviable by distress.[5]

Duke of Cornwall and assessional manors—generally.

The Duke of Cornwall and his lessees, and persons acting under his or their authority, are entitled to enter upon all lands within the seventeen assessional manors of Cornwall,[6] the mines or minerals under which belong to the Duke;[7] and to search for, work, and carry away the mines and minerals; and to erect buildings and machinery; and to make pits, shafts, levels, adits, air-holes, and tramroads, and other roads and works; and to take sufficient stone, lime, and slate for such buildings and works; and to take and use and divert such water; and to use such room for ore and rubbish; and to do all other such acts; as may be necessary or convenient.[8] And the buildings, machinery, and works may either be removed,

[1] 22 & 23 Vict. c. 43, s. 3.

[2] *Ante*, pp. 154, 155.

[3] 22 & 23 Vict. c. 43, s. 4.

[4] S. 5: see also s. 7.

[5] S. 6. Where an Act for inclosing the wastes of a manor reserved the mines to the lord, and gave him full working powers; but provided, that, if any person should be injured by the workings, the person working should make full compensation; and allotments were made both to the commoners and to the lord; it was doubted, whether the compensation clause applied to the allotments to the lord, so as to render a subsequent lessee of the mines thereunder liable to a subsequent purchaser of the surface: see Chapman *v.* Day, 47 L. T. 705, 707.

[6] See *ante*, p. 38.

[7] *Ante*, pp. 38, 39.

[8] 7 & 8 Vict. c. 105, s. 55: see also 7 & 8 Vict. c. 65, s. 3.

or be allowed to remain after they have ceased to be required, and are not by non-user or otherwise deemed to be abandoned.[1] But no damage is allowed to be done to any park or pleasure ground; or to any dwellinghouse; or to any yard, curtilage, or garden, not extending more than fifty feet from a dwelling-house.[2] And, if claimed within six months, compensation must be made for damage to the surface of lands other than waste or demesne lands, or for damage to water, and for the materials taken.[3] The right to and the amount of such compensation are, if necessary, determinable by two justices, or (at the option of the person from whom it is claimed) by the Vice-Warden of the Stannaries;[4] and the compensation may be made by a periodical sum, and may be made to include both past and continuing damage.[5] No compensation is, in general, payable for twelve months after entry;[6] and the Duke is not liable for the acts of his lessees or others.[7] The compensation is payable to the person in possession or receipt of the rents and profits. But if his interest is limited or qualified, and the compensation exceeds £20, he holds it for the benefit of himself and the other persons interested in proportion to their interests; and the respective interests may be established in the Stannaries Court, or in any other court of equity.[8] And if he is under disability or unknown, or his title is disputed, the compensation is payable to the registrar of the Stannaries Court; and is applicable for the benefit of the persons interested according to the order of the Vice-Warden.[9] One month's notice must be given before entry on any lands other than waste lands.[10] And security for damage may from time to time be required from any person other than the Duke; and, until the required security is given, the Vice-Warden may restrain the prosecution of the right of entry.[11] After the determination of the entry and the payment of compensation the security is given up; and differences as to determination and payment are

Compensation.

Notice and security.

[1] 7 & 8 Vict. c. 105, s. 69.
[2] S. 70.
[3] Ss. 55, 68. As to surface damage, see *ante*, p. 155, n. [1].
[4] S. 56. As to the jurisdiction of the Vice-Warden, see *post*, Chap. XVIII., Sect. 1, *a*.
[5] S. 66.
[6] S. 56.
[7] S. 67.
[8] Ss. 57, 58.
[9] S. 59: see also ss. 63, 64.
[10] S. 60.
[11] S. 61: see also ss. 63, 64.

determinable in the Stannaries Court.[1] The costs of all proceedings in the Stannaries Court for any of the above purposes are in the discretion of the Vice-Warden, and may be taxed by the registrar.[2] Compensation and costs may, if necessary, be recovered by action in the High Court, or in the Stannaries Court; and any person entitled thereto has also all the privileges of a mining creditor in respect of the mines in question.[3]

Costs.

Recovery of compensation and costs.

Under the Cornwall Subm. Mines Act, 1858, the Crown, and persons entitled in right of the Crown to mines under the sea adjacent to Cornwall, are entitled to take or use, and to pass through, over, and under, any lands forming part of the possessions of the Duchy (whether in the occupation of tenants or of the Duke), in order to make or sink pits, shafts, adits, drifts, levels, drains, watercourses, pools, or embankments; and to make, lay, place, use, and repair spoil banks, roads, ways, bridges, and banks; and to make, erect, and repair buildings and engines; which may be necessary or convenient for working, carrying away, dressing, or making merchantable the minerals. But two months' previous notice of the nature of the facilities required must be given. And compensation (for ascertaining which special provisions exist, and in respect of which the Crown lessees, and not the Crown, are liable) must be made. And nothing must be done to weaken, injure, or endanger any house or other building. And no way, or works, or machinery, must be laid, made, or erected, or minerals dressed or made merchantable, within fifty yards of a dwelling-house, or on any garden or orchard, or so as to interfere with any of the Duke's mining operations.[4] And sufficient gates, rails, and bars, must be kept to shut up or enclose breaches and openings in fences; and sufficient conveniences made for the convenience and safety of the owners, or of adjoining owners, and of the public; in order to prevent damage or inconvenience and trespasses by cattle or other animals.[5]

Cornwall Subm. Mines Act.

And by the Crown Lands Act, 1866,[6] all persons entitled to

Crown Lands Act.

[1] S. 62.

[2] S. 64.

[3] S. 65. As to the jurisdiction of the Vice-Warden, see *post*, Chap. XVIII., Sect. 1, *a*; and as to the privileges of a mining creditor, see *post*, Chap. XIX., Sect. 3, *a*.

[4] See 21 & 22 Vict. c. 109, ss. 3, 4, 5, 6.

[5] S. 4.

[6] 29 & 30 Vict. c. 62.

or to the management of mines or quarries in or under the foreshore or the adjacent lands, and their tenants, may, on giving to the Board of Trade two months' previous notice, and doing as little damage as may be, and making compensation for all damage according to the Lds. Cl. Cons. Act, 1845, the Lds Cl. Cons. (Scotland) Act, 1845, or the Rail. Act (Ireland), 1851, take into possession, or use, or pass through, over, or under, any portion of the foreshore under the management of the Board, in order to make or sink pits, levels, watercourses, &c.; or to make, lay, place, use, and repair, spoil banks, roads, &c., and engines and buildings, &c.; and do all other necessary or convenient acts for mining or quarrying purposes.[1] But these powers must not be exercised so as to injure, weaken, or endanger piers or other structures.[2] And in exercising them, all necessary and proper works for the safety and accommodation of the public must be made and maintained.[3]

Lands in Ireland.

Where mines in Ireland are demised under the Irish Leasing Acts,[4] the lessee is entitled; and where mines in Ireland are excepted from a grant of the lands, the grantor is (unless he and the grantee have the relation of landlord and tenant[5]) entitled; to erect on the lands smelting houses and other buildings necessary for working the mines; and to cut turf thereon to be employed in the smelting; and to divert and use such streams of water passing through the lands as shall not have been previously used or occupied by any mill or mill dam; making compensation for all damage to the person in possession.[6] And (notwithstanding the relation of landlord and tenant) where mines in Ireland are excepted from a grant of the lands, the person entitled to the rent in fee simple, fee farm, fee tail, or for life, with immediate remainder to his own issue, may work the mines and carry away the minerals; and he or his lessee may enter on the lands and erect houses, railways, tramways, and conveniences, and employ streams; making such compensation to the grantee as may be agreed upon, or in case of non-agreement, as may be ascertained by the chairman of the county. But in exercising

[1] S. 22.
[2] S. 23.
[3] S. 24.
[4] 46 Geo. 3, c. 71; 11 & 12 Vict. c. 13; and the Acts there mentioned.
[5] See 23 & 24 Vict. c. 154, s. 104.
[6] 46 Geo. 3, c. 71, ss. 2, 3.

the latter liberties no mines or minerals can be searched for or worked on the site of any place of worship, graveyard, cemetery, or public school, or within thirty yards thereof; or on the site of any house, outhouse, garden, orchard, or avenue; without the previous consent of the tenant in possession.[1] Where the tenant from year to year of an Irish holding is evicted by his landlord for unreasonably refusing to allow the latter (he making satisfaction for any injury) to enter upon the holding for mining or quarrying purposes, the eviction is not a disturbance within the Irish Act, 33 & 34 Vict. c. 46, unless the landlord persists in the eviction after the tenant withdraws the refusal.[2] And, as one of the statutory conditions under the Irish Act, 44 & 45 Vict. c. 49, for the breach of which a tenant may be compelled to pay a higher rent than the rent payable at the commencement of the statutory term, and may be compelled to quit his holding, the landlord (making satisfaction for any injury) may enter on the holding for mining or taking minerals, or digging or searching for minerals; or quarrying, or taking stone, marble, gravel, sand, brick clay, fire clay, or slate.[3]

(δ.) *Mines Royal.*[4]

Doubtful whether Crown may, to work mines royal, dig pits on surface.

There is a conflict of opinion upon the question, whether the Crown, as the owner of mines royal, is entitled to go upon the overlying surface in the hands of a subject, and dig pits and get the minerals. In the Case of Mines[5] it was laid down, that mines of gold and silver belong to the Crown, with liberty to dig and carry away the ores thereof, and with such other incidents as are necessary to be used for the getting of the ore.[6] The contrary was laid down in *Lyddal* v. *Weston*:[7] "I am of opinion, there is no such power in the Crown, and likewise that by the royal prerogative of mines they have even no such power: for it would be very prejudicial, if the Crown could enter into a subject's lands or grant a licence to work the mines."[8] It is

[1] 23 & 24 Vict. c. 154, ss. 32, 33.
[2] S. 14: see 39 & 40 Vict. c. 63, s. 3.
[3] S. 5.
[4] See *ante*, p. 40.
[5] Plowd. 336.
[6] See also Saltpetre Case, 12 Rep. 13.
[7] 2 Atk. 19.
[8] *Per* Lord Hardwicke.

not easy to see why, in this respect, the Crown should be in a worse position than an ordinary subject.[1] It would appear, at all events, that where the mines in question are once opened, the Crown can either work them, or grant licences for others to do so.[2]

b. Unnecessary User.

Right of user confined, *primâ facie*, to things necessary.

Any right of using a surface, to which a mine owner may be entitled by implication,[3] is confined to such things as are strictly necessary for the convenient working of the mines. The principle, according to which such a right is allowed, would not, therefore, justify any use of the surface, or any deposit upon it, to a greater extent, or for a longer period, than is absolutely necessary; or any attendance upon the land of unnecessary persons.[4] And it is questionable, whether the principle in question would authorise a deposit upon the surface for the purpose of sale; or whether it would justify the introduction of purchasers to view the minerals.[5] And it need hardly be said, that a lessee of coal mines has not, as such, any right to fell trees upon his lessor's land for the purposes of the land; this not being a privilege directly necessary to the enjoyment of the mines.[6] Similarly any right of using a surface, to which a mine

And to *bonâ fide* user.

[1] See, as to the rights in ordinary cases, *ante*, p. 273: see also Seaman *v.* Vawdrey, 16 Ves. 393.

[2] See Lyddal *v.* Weston, 2 Atk. 19, *per* Lord Hardwicke. As to open mines, see *ante*, pp. 22 *et seq.* It is said, that the Crown may dig in the land of a subject for treasure trove: see Saltpetre Case, 12 Rep. 13. The Crown is also said to have the right to dig for and take saltpetre in the lands of subjects: but the owner of the land cannot be restrained from himself also digging and taking it: see *ib.* The other propositions laid down in 12 Rep. 12, as to the King's prerogative in saltpetre, although perhaps of merely historical interest, deserve a reference:—The King's servants cannot, in digging for saltpetre, undermine or impair any walls or foundations of any houses of any nature. Nor can they dig in the floor of the mansion house for saltpetre. Nor can they dig in the floor of any barn for the custody of corn, hay, &c. But they may dig in the floors of stables and ox-houses, &c. After digging, the King's servants must make the places as commodious to the owner as they were before. They must work between sun rising and sun setting. They ought not to place any furnace, &c., in any house or building without the consent of the owner. They ought not to stay long in one place, nor return before a long time has passed.

[3] *Ante*, pp. 273, 274.

[4] See Cardigan *v.* Armitage, 2 B. & C. 211. Cf. Hodgson *v.* Field, 7 East, 621.

[5] See Cardigan *v.* Armitage, *u. s.*

[6] See D'Arcy *v.* Askwith, Hobart, 234.

owner may be entitled by express grant, is only exerciseable *bonâ fide*, and in the usual and reasonable course of working.[1]

c. Destructive or Dangerous User.

(*a.*) *Quarrying—Streaming for Tin.*

No right of destructive user, such as quarrying, unless under clear grant.

Where mines are severed from the overlying surface by a grant of the land, excepting the mines, if the process of digging and getting the minerals would, as in the case of quarrying, necessarily be destructive of, or seriously continuously and permanently injurious to, the surface, the mine owner cannot *primâ facie* work or win the minerals.[2] And where the severance is effected by a grant of the land, excepting the surface, the same principle would, it would seem, *primâ facie*, apply.[3] And if this be so, it is quite clear, that like principles would apply, where it is not known in what manner the severance of the two properties has been effected. The *primâ facie* presumption will not, moreover, be rebutted, unless by language of a perfectly clear and unambiguous kind in the instrument of severance.[4] And the fact, that there may be a consequent difficulty in laying down precisely what a mine owner may do and may not do, is immaterial.[5] In such cases an injunction will be granted, if the defendant claims the right, although he denies having any present intention, to do the act complained of.[6]

Bell *v.* Wilson.

In *Bell* v. *Wilson*,[7] a conveyance of land contained an exception of all mines, with full liberty "to search for, dig, bore, sink, win, work, lead, and carry away the same; and to dig, bore, sink, win, work, and make pit and pits, trench and trenches, groove and grooves, of any kind, in, over, under, through, or along all or any part of the said closes or parcels of ground;" and with other incidental liberties of the fullest kind.

[1] See Honeywell, &c., Co. *v.* Marland, W. N. 1875, p. 46.

[2] See Bell *v.* Wilson, 1 Ch. 303; Hext *v.* Gill, 7 Ch. 699, 714; Whidborne *v.* Eccl. Comms., 7 Ch. D. 379, 381.

[3] See and consider the cases as to support, *post*, Chap. XV., Part C, Sect. 1, *a* (*β*), which involve analogous principles.

[4] Hext *v.* Gill, *u. s.*, 714, 717, 718.

[5] *Ib.* 718.

[6] See *ib.* 699, 711, 712: cf. Hall *v.* Byron, 4 Ch. D. 679, 680.

[7] 1 Ch. 303.

Under these provisions a right of working freestone in an open quarry was claimed. It was, however, held, notwithstanding the wide terms used, that the grantor had no such right, but had only liberty to get the freestone by underground mining.

Hext v. Gill.

So in *Hext* v. *Gill*.[1] There the conveyance of the freehold in a copyhold tenement to the copyholder contained an exception of all mines, "together with full and free liberty of ingress, egress, and regress, into and out of the said several premises and every part thereof, with or without horses, carts, and carriages, to dig, and search for, and to take, use, and work, the said excepted mines and minerals." Under the tenement in question was a bed of china clay, which, it was admitted, could not be gotten without totally destroying the surface. It was held, that the mineral owner had not, under the terms of the exception and liberty, any right to get the clay.[2]

Same principle probably applies as to "streaming for tin."

"Streaming" for tin, which is the ancient method of getting tin in Cornwall,[3] is a process for obtaining grain tin by means of washing. It is necessarily carried on entirely by means of open workings, and it appears to usually result in as complete a destruction of the surface as takes place in the case of quarrying.[4] It is probable, that a reservation in the terms contained in the instrument in question in *Hext* v. *Gill*,[5] is insufficient to confer a right of streaming for tin; notwithstanding that that process was thoroughly well known and common at the date of the instrument.[6]

Mode of dealing with damages where surface in settlement.

Where a surface belongs to one for life, with remainders over, and damages are recovered for injury to the surface, they are dealt with on similar principles[7] to those which apply where mines belong to one for life who is not entitled to work them, with remainders over, and they are wrongfully worked by a stranger.[8]

[1] 7 Ch. 699.

[2] For the form of the order restraining him, see 7 Ch. 718: see also Whidborne *v.* Eccl. Comms., 7 Ch. D. 381. See further, as to the decisions in Bell *v.* Wilson and Hext *v.* Gill, *ante*, pp. 13, 14.

[3] See *post*, Chap. XVIII., Sect. 3, *d*.

[4] See Hext *v.* Gill, 7 Ch. 704.

[5] See *supra*.

[6] See Hext *v.* Gill, *u. s.*, 717, 718, *per* Mellish, L. J.

[7] See Bell *v.* Wilson, 1 Ch. 309.

[8] See *post*, Chap. XXII., Sect. 2, *d*.

(β) *Fencing Excavations.*

Neglect to fence.

A mine owner, who, under an express or implied liberty, sinks a shaft through the surface for the purpose of working his mines, is bound, *primâ facie*, to keep such shaft properly fenced. And if, through his neglect of this duty, or his insufficient performance of it, cattle belonging to the surface owner fall through the shaft, and are killed or injured, the mine owner will be liable.[1]

Compensation for damage.

A mine owner, who has a customary right to excavate the surface and construct reservoirs thereon upon the terms of compensating the surface owner for all damage done, and who excavates the surface and constructs a reservoir accordingly, is bound to compensate the surface owner once for all for the permanent damage in respect of fences. But he is, on the other hand, free from all liability in respect of future damage from the same cause. For his acts are not those of a wrongdoer.[2]

[1] Williams *v.* Groucott, 4 B. & S. 149. See also Sybray *v.* White, 1 M. & W. 435, where the point seems to have been assumed.

[2] Great Laxey Mining Co. *v.* Clague, 4 App. Cas. 115. See further, as to the fencing of excavations, *ante*, p. 270.

CHAPTER XV.

NEIGHBOURS—SUPPORT.

PART A.—DIFFERENT KINDS OF SUPPORT.

Lateral and vertical support.

SUPPORT may be lateral or vertical, or partly lateral and partly vertical. It has been often said, that there is a difference in principle between the right of lateral and the right of vertical support.[1] But it is difficult to refer to any principle applicable to the former right, which does not equally apply to the latter; and it is submitted, that the two rights depend upon precisely the same principles.[2]

Substance receiving support.

Support, whether lateral or vertical, may be support for land in its natural state, whether uncovered by water, or covered by water the presence of which is due to natural causes; or support for land in its non-natural state, whether artificially burdened by a building or a canal or reservoir, or artificially weakened by an excavation. Between the rights to these two kinds of support there is a wide distinction in principle.

Substance giving support.

Support, whether lateral or vertical, and whether for land in its natural state, or for land in its non-natural state, may be support by land, or support by water. Between the rights to

[1] See Rowbotham *v.* Wilson, 8 E. & B. 148, *per* Bramwell, B.; Rogers *v.* Taylor, 2 H. & N. 834, 835, *per* Watson, B.; Hunt *v.* Peake, Joh. 709, 710, *per* Wood, V. C.; Richards *v.* Jenkins, 17 W. R. 31, *per* Kelly, C. B., and Martin, B. Cf. Angus *v.* Dalton, 3 Q. B. D. 120. *per* Cockburn, C.J., and Mellor, J. Cf. also Richards *v.* Harper, L. R. 1 Exch. 203. where the point was argued, but not decided.

[2] See Humphries *v.* Brogden, 12 Q. B. 743, 744, 746, *per* Lord Campbell; Cal. R. C. *v.* Sprot, 2 Macq. 451, *per* Lord Cranworth; Rowbotham *v.* Wilson, *u. s.*, 142, *per* Watson and Martin, BB.; Bonomi *v.* Backhouse, E. B. & E. 642, *per* Erle, J.; Angus *v.* Dalton, *u. s.*, 99, *per* Lush, J.; Dalton *v.* Angus, 6 App. Cas. 791, 793, *per* Lord Selborne (see also 752. 754); Chapman *v.* Day, 47 L. T. 708. *per* Denman, J. *Re* Dudley, 8 Q. B. D. 86 (see pp. 94, 95, 96), does not contain anything to the contrary.

the two latter kinds of support there is also a distinction in principle.

The right of support does not, of course, exist solely with respect to surface land. Questions as to the right may equally arise as between two strata which underlie the surface.[1] Two underlying strata.

PART B.—NATURE OF RIGHT OF SUPPORT.

a. Substance Receiving Support.

(*a.*) *Land in Natural State.*

Where a right of support, whether lateral or vertical, exists for land in its natural state,[2] the right is not a mere easement;[3] in the sense, at all events, of a conventional easement.[4] It is not, however, an absolute right of property; or, at all events, an absolute right of property in the same sense as a right to prevent a trespass on one's land.[5] Under no circumstances, for instance, has a surface owner, as such, any right to the minerals by which his surface is supported. The property in such minerals belongs exclusively to the mine owner. And if a trespass is committed in respect of the minerals, the mine owner is the person entitled to take proceedings.[6] Under no circumstances, moreover, can the surface owner, as such, insist upon the minerals being kept in their natural state.[7] The mine owner may remove every particle of his minerals, even including those immediately adjacent or subjacent to the surface, if, for the

Right for land in natural state not an easement.

But not an absolute right of property.

[1] See Mundy *v.* Rutland, 23 Ch. D. 81, 89, 96.

[2] See *infra*, Part C., Sect. 1, *a.*; Sect. 2, *a.*

[3] See Rowbotham *v.* Wilson, 8 E. & B. 124, 146, 151, 152, 155; 8 H. L. C. 348; Solomon *v.* Vintners' Co. 4 H. & N. 597; Bonomi *v.* Backhouse, E. B. & E. 636, 637, 654; Backhouse *v.* Bonomi, 9 H. L. C. 512, 513; Hunt *v.* Peake, Joh. 710; Birmingham *v.* Allen, 6 Ch. D. 287; Angus *v.* Dalton, 4 Q. B. D. 167, 184; Dalton *v.* Angus, 6 App. Cas. 742, 772, 791, 808; Bell *v.* Love, 10 Q. B. D. 559; Pountney *v.* Clayton, 31 W. R. 666.

[4] Lords Selborne and Watson spoke of it as a natural easement in Dalton *v.* Angus, *u. s.*, 792, 830.

[5] The nature of the right has been laid down too broadly in many of the cases.

[6] Harris *v.* Ryding, 5 M. & W. 74, 76.

[7] See Bonomi *v.* Backhouse, *u. s.*, 655, *per* Willes, J.; Dalton *v.* Angus, *u. s.*, 808, *per* Lord Blackburn.

natural support which such minerals would have afforded, he substitutes artificial support.[1]

Backhouse *v.* Bonomi.

The nature of the right in question is illustrated in *Backhouse* v. *Bonomi*.[2] There, A. was the owner of certain houses,[3] and of the surface land on which they stood. B. was the owner of a mine under that land, and under the surrounding land. A. was entitled to have his land supported. B. worked his mine, and in so doing left insufficient support for the houses. The houses were not damaged, nor was the enjoyment of them prejudiced, until some time after the workings had ceased. It was decided, that a right of support could not be infringed by mere excavations in adjacent or subjacent lands; and that, although something might be done causing results which afterwards produced damage, the right was not infringed until the damage actually took place. It was accordingly held, that A. was not under the Statute of Limitations bound to bring his action within six years after the workings had rendered the support insufficient; but that he was entitled to bring it at any time within six years after the mischief had happened.[4] It is further illustrated

Smith *v.* Thackerah.

in *Smith* v. *Thackerah*.[5] There, A. dug a well near B.'s land, which sank in consequence, and a building erected on it within twenty years fell. B. was entitled to have his land supported. It was proved, that, if the building had not been on B.'s land, the land would still have sunk,[6] but that the damage to B.

[1] See Humphries *v.* Brogden, 12 Q. B. 744, *per* Lord Campbell. See also Harris *v.* Ryding, 5 M. & W. 74, 76; Rowbotham *v.* Wilson, 8 E. & B. 157; Bonomi *v.* Backhouse, E. B. & E. 637, 655, 656; Backhouse *v.* Bonomi, 9 H. L. C. 508, 512; Eadon *v.* Jeffcock, L. R. 7 Exch. 395; Bower *v.* Peate, 1 Q. B. D. 325, 327; Lamb *v.* Walker, 3 *ib.* 396, 401; Atkinson *v.* King, I. R. 11 C. L. 541; Dalton *v.* Angus, 6 App. Cas. 752. The dicta to the contrary of Christian, L. J., in Atkinson *v.* King, 2 L. R. (Ir.) 340, 342, 344, 360, are unsustainable.

[2] 9 H. L. C. 503, affirming Bonomi *v.* Backhouse, E. B. & E. 622.

[3] Nothing turned on the fact of houses having been upon the land: see as to this, Angus *v.* Dalton, 4 Q. B. D. 169, 170, 185, 195.

[4] See also Spoor *v.* Green, L. R. 9 Exch. 111; Lamb *v.* Walker, 3 Q. B. D. 389; Dalton *v.* Angus, *u. s.*, 808, 830. These cases, in effect, overrule, upon this point, Nicklin *v.* Williams, 10 Exch. 259. Cf. Roberts *v.* Read, 16 East, 215; and see Rowbotham *v.* Wilson, 8 E. & B. 158; 8 H. L. C. 359, 365, 367; Bower *v.* Peate, 1 Q. B. D. 325, 327.

[5] L. R. 1 C. P. 564.

[6] See, as to this, *infra*, Part C, Sect. 1, *b* (γ).

would have been inappreciable. It was held, that B. had no right of action against A.[1]

Damages recoverable once for all in single action.

It must not, however, be concluded, that where the owner of land in its natural state is entitled to have it supported, each fresh damage caused by the removal of the support creates, as it occurs, a fresh cause of action; or that damages, as well prospective as past, cannot be recovered in a single action. Although no action will lie until actual damage occurs, the damage, *per se* and apart from the wrongful act of removing the support, does not constitute a cause of action. As soon as the damage occurs, the act of removal becomes wrongful: *damnum* and *injuria* then combine; and it is this combination, which creates the right of action. Accordingly, the wrongdoer, on the one hand, becomes liable at once for all the injurious consequences of his act, both past, present, and future; and on the other hand, can only be so made liable in a single action.[2]

Result of the cases.

The result of the preceding cases may be expressed as follows:—

(1.) Where a right of support, whether lateral or vertical, exists for land in its natural state, the right is not a mere easement.

(2.) It is so far a right of property, that, if and when appreciable damage ensues from its infraction, a cause of action arises.

(3.) Only one action can be brought for the infraction of the right; but, in such action, the injured party can recover for all damage, past, present, and prospective.

(β) *Land in Non-Natural State.*

Right for land in non-natural state an easement.

Where a right of support, whether lateral or vertical, exists for land in its non-natural state,[3] the right is not in any sense a right of property, but is essentially only a conventional ease-

[1] See also Richards *v.* Jenkins, 17 W. R. 34.

[2] See Lamb *v.* Walker, 3 Q. B. D. 389, *per* Manisty and Mellor, JJ.; Cockburn, C.J., dissenting. See also Nicklin *v.* Williams, 10 Exch. 259; Bonomi *v.* Backhouse, E. B. & E. 658; Backhouse *v.* Bonomi, 9 H. L. C. 503. Cf. Whitehouse *v.* Fellowes, 10 C. B. N. S. 765.

[3] See *infra*, Part C., Sect. 2, *b*.

ment.[1] But although the two rights stand upon different footings as to the modes of acquiring them, the character of the rights, when acquired, is in each case the same.[2]

b. Substance Giving Support.

(*a*) *Land.*

Land—degrees of right not measured.

Where a right of support exists, whether lateral or vertical, and whether for land in its natural state, or for land in its non-natural state, degrees cannot be measured out to which the right will extend.[3] In some cases the minerals giving the support may, as in the case of hæmatite ore, be extremely friable, and lie in irregular beds; so as to render it impossible to calculate what extent of support may be sufficient.[4] In other cases the line dividing the two adjoining lands may traverse a bed of sand, or a marsh, or a loose gravelly soil; so as to render it certain, that a considerable extent of support will be necessary.[5] In other cases again the line may traverse a quarry of hard stone or marble; so as to render it certain, that a very small extent of support will be necessary.[6] Of all such questions the right is wholly independent. It is neither affected by the nature of the strata,[7] nor by the difficulty of propping up the surface.[8] It is an absolute right to have the surface protected from subsidence, and kept securely at its ancient and natural level.[9]

[1] See Bonomi *v.* Backhouse, E. B. & E. 655; Backhouse *v.* Bonomi, 9 H. L. C. 503, 512. See also Partridge *v.* Scott, 3 M. & W. 220; Humphries *v.* Brogden, 12 Q. B. 748; Angus *v.* Dalton, 4 Q. B. D. 162, 169, 185, 192–196; Dalton *v.* Angus, 6 App. Cas. 763, 772, 780, 786, 788, 792, 793. See, however, *ib.* 768, 769, *per* Manisty, J.

[2] See Bonomi *v.* Backhouse, *u. s.*, *per* Willes, J.; Dalton *v.* Angus, *u. s.*, 792, *per* Lord Selborne; 809, *per* Lord Blackburn: see also pp. 742, 746. Cf. Birmingham *v.* Allen, 6 Ch. D. 292, *per* James, L.J.; 297, *per* Brett, L.J.

[3] Humphries *v.* Brogden, 12 Q. B. 745; Cal. R. Co. *v.* Sprot, 2 Macq. 451; Mundy *v.* Rutland, 23 Ch. D. 89. See *Re* Dudley, 8 Q. B. D. 93, 94, 96.

[4] See Wakefield *v.* Buccleuch, 4 Eq. 628, 638; Buccleuch *v.* Wakefield, L. R. 4 H. L. 405.

[5] See Cal. R. Co. *v.* Sprot, 2 Macq. 451.

[6] *Ib.* See also N. E. R. Co. *v.* Elliot, 1 J. & H. 152, *et seq.*

[7] Humphries *v.* Brogden, 12 Q. B. 745; Rowbotham *v.* Wilson, 6 E. & B. 601.

[8] Humphries *v.* Brogden, *u. s.*; Rowbotham *v.* Wilson, *u. s.*, 602. See, however, Rowbotham *v.* Wilson, 8 H. L. Cas. 363, 364.

[9] Humphries *v.* Brogden, *u. s.*;

On the same principle, the extent of the right is not necessarily limited by the land of the immediately adjoining owner. If a piece of land belonging to B., half a mile in width or depth, adjoins land of A., and is utterly insufficient in its natural state to support A.'s land; and on the other side of such piece lies land of C., which contributes to the support of A.'s land; C. is A.'s neighbour for the purpose of questions relating to the right of support. If, on the other hand, a strip of land belonging to B., a foot only in width or depth, adjoins land of A., and is sufficient, if left in its natural state, for the support of A.'s land; and on the other side of such strip lies land of C., which (so long as B.'s land is left in its natural state) contributes in no degree whatever to the support of A.'s land; C. cannot in consequence of B. having disturbed the natural state of his (B.'s) land, become A.'s neighbour for the purpose of questions relating to the right of support.[1] The person against whom the right is exerciseable is the owner of that land, the existence of which in its natural state is necessary, and is also sufficient, for the support of the land of the person entitled to support.[2] Meaning of 'neighbour.'

(β) *Water.*

Although there may be gradations of every kind of support, from solid rock to gravel or sand or bog, the right reaching over a greater or less area according to the stability of the soil, the principle of the right does not apply, *primâ facie*, to the extreme case of support from water.[3] Water.

Mundy *v.* Rutland, 23 Ch. D. 89. If, and so far as, the expression "reasonable support," in Harris *v.* Ryding (5 M. & W. 70), is inconsistent with the statements in the text, it cannot be sustained: see Humphries *v.* Brogden, 12 Q. B. 751.

[1] See Birmingham *v.* Allen, 6 Ch. D. 284, 289, 293, 295, 297.

[2] See *ib.* It has been already seen, that a natural support may be removed, and an artificial support substituted, without necessarily infringing the right of support: see *ante*, pp. 287, 288.

[3] Popplewell *v.* Hodkinson, L. R. 4 Exch. 248. The right of support from water may be acquired by grant, express or implied: see *infra*, Part E.

c. *Generally.*

Right independent of values of substances or of mode of working.

Where a right of support exists, whether lateral or vertical, and whether for land in its natural state, or for land in its non-natural state, it is wholly independent of the comparative values of the substance receiving and the substance giving the support.[1] And, where a right of support exists, the right is not affected by the fact, that the workings of the adjacent or subjacent owner may have been conducted carefully, or skilfully, or according to the custom of the country.[2]

Right only to prevent removal after existence as separate tenement.

The right of support is, however, only a right to prevent one's neighbour from removing the substance giving the support subsequently to the existence, as a separate tenement, of the substance receiving the support. Where the owner of the substance receiving and the substance giving the support removes the substance giving the support; and subsequently, without fraud or concealment, sells the substance receiving the support; the purchaser purchases subject to all the damage which the removal may occasion.[3] And, if, in consequence of the previous removal, although subsequently to the purchase, a subsidence takes place, a new cause of action is not thereby created.[4] This is not contrary to the principle of *Backhouse* v. *Bonomi*.[5] For that principle only applies, where, at the origin, as a separate tenement, of the substance receiving the support, the substance giving the support is still in existence.[6] Of course, however, if fraud or concealment were practised upon the purchaser at the date of the purchase, his position would be different.[7]

[1] Humphries *v.* Brogden, 12 Q. B. 745; Dalton *v.* Angus, 6 App. Cas. 752.

[2] See *ib.* See also Roberts *v.* Haines, 6 E. & B. 653; Haines *v.* Roberts, 7 *ib.* 627; Brown *v.* Robins, 4 H. & N. 193; Hunt *v.* Peake, Joh. 710; Stroyan *v.* Knowles, Hamer *v.* Knowles, 6 H. & N. 454; Elliot *v.* N. E. R. C., 10 H. L. C. 333; Davis *v.* Treharne, 6 App. Cas. 460, 464, 469. Cf. Aspden *v.* Seddon, 1 Ex. D. 496, 506.

[3] See Spoor *v.* Green, L. R. 9 Exch. 99 (which, however, was an action, not of tort, but of covenant); Dalton *v.* Angus, *u. s.*, 809. Cf. Dennett *v.* Atherton, L. R. 7 Q. B. 327.

[4] Spoor *v.* Green, *u. s.*, *per* Cleasby and Bramwell, B.B.; Kelly, C. B., dissenting.

[5] *Ante*, p. 288.

[6] The statement in the head note of the report of Spoor *v.* Green, *u. s.*, as to the application of the principle of Backhouse *v.* Bonomi, is incorrect.

[7] Spoor *v.* Green, *u. s.*, 107, 109. As to the effect of covenants for title, see *ante*, pp. 210, 211.

Where a natural substance constitutes a support, the right of support is merely a right to prevent one's neighbour from actively interfering to remove the support. If a natural support falls away merely through the operation of natural causes, the injured person has, *primâ facie*, no right of action against his neighbour for his mere passive omission.[1] In such a case the person claiming the right must, if he wishes to prevent an injury, himself take the necessary steps.[2] And he may, if he pleases, enter for that purpose on the land of his neighbour.[3] The consequences are, no doubt, different, if a natural support is removed, and an artificial support substituted,[4] and the artificial support is not properly maintained.

Right generally in respect merely of active interference.

PART C.—EXISTENCE OF RIGHT OF SUPPORT.

Sect. 1.—NO ACTUAL OR ALLEGED CONTRACT, CUSTOM, OR PRESCRIPTION.

a. Land in Natural State.

(a) *No Evidence as to Severance.*

Where land is in its natural state; and no contract, custom, or prescription is available to regulate its right to support; and no evidence is producible as to the time or mode of its severance from the adjoining land, whether by reason of both lands having been always separate, or of nothing being known of their ownership except that it was severed at some past period; the owner of the former land is entitled to have it supported by the latter;

Where no evidence as to severance, owner of land in natural state has *primâ facie* right to support.

[1] See and consider Pomfret *v.* Ricroft, 1 Wms. Saund. 557; Colebeck *v.* Girdlers' Co., 1 Q. B. D. 243.

[2] See and consider Colebeck *v.* Girdlers' Co., *u. s.*

[3] *Ib.*

[4] Which may be done: see *ante*, pp. 287, 288.

whether the latter adjoin laterally,[1] or vertically.[2] In other words, every owner of land in its natural state has a *primâ facie* right to support, lateral as well as vertical; and the adjacent or subjacent owner has no right, *primâ facie*, in order to win his minerals, to withdraw such support. Accordingly, in an action for removing support from land in its natural state, the plaintiff has never been obliged, as a matter of pleading, to allege that he was entitled to the support.[3]

(3) *Voluntary Severance.*

Grantee with exception of mines has similar right.

Where a grant is made of land in its natural state, whether by way of conveyance in fee simple, or by way of lease, with an exception of the mines; and no provision is made with respect to support; the grantee is entitled to support as incident to his grant.[4] And of course the same principle prevails, where a

[1] See 2 Rolle's Abr. 564, tit. Trespass (I) pl. 1; Com. Dig., Action upon the Case for a Nuisance (A); Hunt *v.* Peake, Joh. 705. The land in the latter case was built upon; but it was found, that, even if unbuilt upon, it would have been injured (upon which point, see *post*, p. 301). See also Wyatt *v.* Harrison, 3 B. & Ad. 871, 876; Humphries *v.* Brogden, 12 Q. B. 744; Cal. R. C. *v.* Sprot, 2 Macq. 458; Bonomi *v.* Backhouse, E. B. & E. 636, 654; Backhouse *v.* Bonomi, 9 H. L. C. 512, 513; N. E. R. C. *v.* Elliot, 1 J. & H. 153; Solomon *v.* Vintners' Co., 4 H. & N. 597; Murchie *v.* Black, 19 C. B. N. S. 207; Birmingham *v.* Allen, 6 Ch. D. 287; Pountney *v.* Clayton, 31 W. R. 504, 666.

[2] Humphries *v.* Brogden, 12 Q. B. 739. See also Harris *v.* Ryding, 5 M. & W. 60; Smart *v.* Morton, 5 E. & B. 30, 46; Roberts *v.* Haines, 6 E. & B. 643; Haines *v.* Roberts, 7 E. & B. 625; Cal. R. C. *v.* Sprot, 2 Macq. 458; Rowbotham *v.* Wilson, 6 E. & B. 601; 8 E. & B. 149; N. E. R. C. *v.* Elliot, 1 J. & H. 153; Eadon *v.* Jeffcock, L. R. 7 Ex. 388; Hext *v.* Gill, 7 Ch. 713; Atkinson *v.* King, 2 L. R. (Ir.) 332; Angus *v.* Dalton, 4 Q. B. D. 167; Davis *v.* Treharne, 6 App. Cas. 460, 466; Bell *v.* Love, 10 Q. B. D. 558; Pountney v. Clayton, 31 W. R. 504, 666.

[3] See Humphries *v.* Brogden, 12 Q. B. 741, 742. See also Littledale *v.* Lonsdale, 2 H. Bl. 267, there cited; Rowbotham *v.* Wilson, 8 E. & B. 142; Dalton *v.* Angus, 6 App. Cas. 809; Bull. & L. (3rd edit.), 406, n. (*b*).

[4] Roberts *v.* Haines, 6 E. & B. 652, 654, 655; Cal. R. C. *v.* Sprot, 2 Macq. 451; Proud *v.* Bates, 34 L. J. Ch. 406, 412; Williams *v.* Bagnall, 15 W. R. 275; Richards *v.* Jenkins, 17 *ib.* 31; Eadon *v.* Jeffcock, L. R. 7 Exch. 388; Buchanan *v.* Andrew, L. R. 2 Sc. & D. 288; Aspden *v.* Seddon, 10 Ch. 396 (n); *ib.* 1 Exch. D. 503; Mundy *v.* Rutland, 23 Ch. D. 96; Pountney *v.* Clayton, 31 W. R. 667. Cf. Bell *v.* Wilson, 1 Ch. 303; Hext *v.* Gill, 7 Ch. 714; Whidborne *v.* Eccl. Comms., 7 Ch. D. 379, 381.

grant is made of mines with an exception of underlying mines.[1] And a subsequent purchaser or lessee from the grantor cannot, as against the right, shelter himself under a plea of want of notice.[2] And there is no exception from this general rule. The lord of a manor is, no doubt, entitled, *primâ facie*, in working minerals under the wastes, to withdraw support from the surface; provided he leaves sufficient common for his commoners.[3] But the lord has himself the property in the surface of the wastes, as well as in the underlying minerals.[4] And, *primâ facie*, there is no limit to the exercise of his rights except that he should leave a sufficiency of common.[5] On similar principles, where a lease was made of mines, with an exception of underlying mines, it was held, that the lessor could not work the underlying mines in such a way as to withdraw support from the barrier of the demised mines, and so render the demised mines liable to an influx of water from an adjoining worked-out mine.[6]

Grantee with exception of surface has similar right, whether grant is in fee,

Where there is a grant of land in its natural state by way of conveyance in fee simple, with an exception of the surface; and no provision is made with respect to support; the law is precisely the same. Previously to *Davis* v. *Treharne*[7] this proposition might perhaps have been considered uncertain. There was no actual decision either in favour of or against it; and the *dicta* were not uniform. But the *dicta* in favour of it greatly preponderated.[8] And its authority was really concluded by the circumstances under which *Humphries* v. *Brogden*[9] was

[1] Mundy *v.* Rutland, 23 Ch. D. 81, 89, 96, 97.

[2] *Ib.* 90, 91.

[3] Bell *v.* Love, 10 Q. B. D. 559, 560, 561, 566.

[4] See *ante*, pp. 36, 76.

[5] See Bell *v.* Love, *u. s.*; *ante*, p. 76. His rights may be restricted by custom: see and consider the reference to the special case in Bell *v.* Love, *u. s.*, 561.

[6] Mundy *v.* Rutland, 23 Ch. D. 81, 90, 96.

[7] 6 App. Cas. 460.

[8] See, against it, Rowbotham *v.* Wilson, 8 E. & B. 149, 150. *per* Martin, B.: in favour of it, Humphries *v.* Brogden, 12 Q. B. 746, 747, *per* Lord Campbell; Rowbotham *v.* Wilson, 8 H. L. C. 360, *per* Lord Wensleydale; Dugdale *v.* Robertson, 3 K. & J. 700; Shafto *v.* Johnson, 8 B. & S. 252, n., *per* Wood, V.C.; Richards *v.* Jenkins, 17 W. R. 31, *per* Kelly, C.B., and Martin, B.; Aspden *v.* Seddon, 1 Exch. D. 507, 509, *per* Cleasby, B., and Mellish, L.J. Cf. Eadon *v.* Jeffcock, L. R. 7 Exch. 388.

[9] 12 Q. B. 739: see *ante*, p. 294.

decided. For the surface owner must in that case be taken to have shown his right to support in whichever way the severance might be supposed to have been effected, whether by a grant excepting the mines, or by a grant excepting the surface.[1] If, however, there was formerly any real uncertainty on this point, it was removed by the House of Lords in *Davis* v. *Treharne*.[2]

or for years.

Where the grant takes the form of a lease for years, the case formerly presented greater difficulty. There was a complete contradiction of *dicta;* three cases containing *dicta,* that a lessor must be taken, *primâ facie,* to retain the right of support,[3] and a fourth case *dicta* to the contrary.[4] The latter *dicta* were founded upon the proposition, that a mining lease, "being a contract entered into between the owner of both surface and minerals and a lessee for the purpose of removing and making saleable minerals, which form in part what is called the natural support of the soil,"[5] should be governed by a different principle of construction from that which should govern a sale of mines. And from this it was concluded, that, in a lease of mines, no terms should be imported into the contract except what were actually expressed ; and accordingly, that, if the right of support were not expressly reserved, it could not be reserved by implication.[6] Now it is no doubt the fact, that a mining lease in general contemplates an immediate removal of the minerals, whereas a sale or exception may

[1] There was no evidence to show how the severance had taken place, and in theory it must have taken place in either of the two ways: see Rowbotham *v.* Wilson, 8 H. L. C. 355.

[2] 6 App. Cas. 460. The doctrine of implied reservation stands for this purpose on the same footing as the doctrine of implied grant: see Wheeldon *v.* Burrows, 12 Ch. D. 31, 44, 49, &c., 59; London *v.* Riggs, 13 *ib.* 805. The maxim, "a grant is to be construed most strongly against the grantor" is obsolete. See Taylor *v.* St. Helen's, 6 Ch. D. 270. Cf. Williams *v.* Bagnall, 15 W. R. 274, 275, 276.

[3] See Dugdale *v.* Robertson, 3 K. & J. 695, 700 ; Shafto *v.* Johnson, 8 B & S. 252 n., 254 n., *per* Wood, V.-C.; Smith *v.* Darby, L. R. 7 Q. B. 724, 725, 726, *per* Blackburn, Mellor, and Lush, JJ.

[4] See Eadon *v.* Jeffcock, L. R. 7 Exch. 388, 390, *per* Cleasby and Martin, BB. See also Hodgson *v.* Moulson, 18 C. B. N. S. 332, where the Court evidently took the same view.

[5] Eadon *v.* Jeffcock, L. R. 7 Exch. 388, *per* Cleasby and Martin, BB.

[6] See Eadon *v.* Jeffcock, *u. s.* The learned judges then proceeded to comment upon Dugdale *v.* Robertson, 3 K. & J. 695, and disapproved of that decision. See also Aspden *v.* Seddon, 10 Ch. 399 n., *per* Jessel, M.R.

as often as not contemplate a removal at a future time. And it is also the fact, that, where, as is usually the case, a royalty is reserved, the lease contemplates the removal on as large a scale as possible. These, however, were small circumstances upon which, without more, to found a distinction between the two cases with respect to the right of support. In *Davis* v. *Treharne*[1] the House of Lords declared what the law is. According to this decision, it does not follow from the mere facts of a lease having been granted and a royalty reserved thereunder, that there is not a right of support. Those facts may be elements to be taken into consideration, in seeing whether or not the right is taken away. But they are not sufficient of themselves to decide that question.[2]

Result of the cases.

As the result of the cases, in which a voluntary instrument of severance is producible, but in which no provision has been made with respect to support, the following propositions may be considered as established :—

(1) The owner of land in its natural state is entitled, *primâ facie*, to support, both lateral and vertical.

(2) This is so, in whichever way the severance is effected; whether by a grant excepting the mines, or by a grant excepting the surface.

(3) Where the mines are granted, the facts, that the grant is by way of lease; and that a royalty is reserved; are not, of themselves, sufficient to disturb the presumption.[3]

(γ) *Statutory Severance.*

Same principles apply to statutory severance.

A severance of the ownership of adjoining lands is frequently effected under the provisions of Inclosure Acts, or of the Copyhold Enfranchisement Acts. Of course it will seldom in such cases happen, that some attempt will not be made by the instrument of severance to regulate the rights of

[1] 6 App. Cas. 460.

[2] See pp. 466, 467, *per* Lord Blackburn; p. 469, *per* Lord Watson. See also Chapman *v.* Day, 47 L. T. 705, 709; Mundy *v.* Rutland, 23 Ch. D. 89; Pountney *v.* Clayton, 31 W. R. 664, 666.

[3] See further, as to support under leases, *ante*, pp. 234, 235, 236.

the respective parties. Should, however, this not be so, and should the right of support in such cases have to be determined on *primâ facie* grounds, the same principles will be applicable as are applicable where the severance is effected by a voluntary instrument.[1]

(δ) *Land covered by Water.*

Land covered by water.

The foregoing principles have been considered with reference to the right of support for land in its natural state uncovered by water. It is conceived, that the same principles apply to the right of support for land upon or over which water rests or flows in the ordinary course of nature.[2]

b. Land in Non-natural State.

(a) *Artificial Weight.*

Owner of land artificially burdened has, *primâ facie*, no right of support for the weight.

Where land has been artificially burdened by a building; and no contract is available to regulate its right to support; no right of support, lateral or vertical, exists for the building.[3] And, of course, the same principle applies to the case of an artificial basin, or reservoir, or canal, or watercourse.[4] And where a

[1] Roberts *v.* Haines, 6 E. & B. 652, 654, *per* Lord Campbell, and Coleridge and Erle, JJ.; Haines *v.* Roberts, 7 *ib.* 626, *per* Cockburn, C.J.; N. E. R. Co. *v.* Elliot, 1 J. & H. 153, *per* Wood, V.-C.; 2 De G. F. & J. 432, *per* Lord Campbell; Elliot *v.* N. E. R. Co., 10 H. L. Cas. 356, 362, *per* Lords Chelmsford and Kingsdown; Wakefield *v.* Buccleuch, 4 Eq. 649, *per* Malins, V.-C.; Buccleuch *v.* Wakefield, L. R. 4 H. L. 411, *per* Lord Chelmsford. See also, as to Inclosure Acts, Bell *v.* Love, 10 Q. B. D. 564, 565, 568, *per* Baggallay and Lindley, L. JJ.

[2] The right to withdraw support from naturally flowing water, the person interested in which has no title to the soil over which it flows, falls under the same principle as the right to abstract naturally flowing water, and will be more conveniently considered hereafter: see *post*, Chap. XVII., Part A., Sect. 1, Sect. 2.

[3] Wilde *v.* Minsterley, 2 Rolle's Abr. 564, tit. Trespass I., pl. 1; Palmer *v.* Fleshees, 1 Sid. 167; Stansell *v.* Jollard, cited in 1 Selw. N. P., 11th ed., 457; Wyatt *v.* Harrison, 3 B. & Ad. 871; Partridge *v.* Scott, 3 M. & W. 220; Hyde *v.* Thornborough, 2 C. & K. 250; Jeffries *v.* Williams, 5 Exch. 800; Gayford *v.* Nicholls, 9 *ib.* 708; Rogers *v.* Taylor, 2 H. & N. 828; Hunt *v.* Peake, Joh. 705; N. E. R. Co. *v.* Elliot, 1 J. & H. 153; Dalton *v.* Angus, 6 App. Cas. 753, 772. Slingsby *v.* Barnard, 1 Rolle's R. 430, pl. 24, so far as it is inconsistent with the proposition in the text, cannot be upheld: see Dalton *v.* Angus, *u. s.*, 742, 743.

[4] There is, of course, no analogy

right of support for an artificial weight has been acquired by way of easement,[1] no right of support exists, *primâ facie*, for any increase to that weight; whether caused by actual additions,[2] or by mere internal structural alterations.[3] Accordingly, in an action for removing support from land artificially burdened, the plaintiff has always, in general, been obliged, as a matter of pleading, to allege that he was entitled to have the weight supported.[4] However, even in the case of an artificial weight, a mere trespasser has no right to remove the support. Where, therefore, the defendant is presumably a trespasser, it is not necessary to allege a right to have an artificial weight supported.[5] It is not, in any case, necessary to allege the grounds upon which the plaintiff is entitled to support.[6]

(β) *Artificial Weakening.*

Similar principles apply to land artificially weakened.

Similar principles apply where, instead of the natural weight of the land being increased by having anything put or brought upon its surface, its self-sustaining power is weakened by reason of excavations being made under or horizontally adjacent to its surface.

Immaterial whether

And, for this purpose, it is immaterial whether the excavations

between cases, in which the owner of land burdens it artificially with water, and claims a right of support for the land so burdened, and cases, in which a man claims a right of support for an artificial watercourse, without having any title to the land over which it flows. The latter right falls under the same principle as the right to abstract water from an artificial watercourse, and will be more conveniently considered hereafter: see *post*, Chap. XVII., Part A, Sect. 3.

[1] See *infra*, Sect. 2, *b*.

[2] See Murchie *v.* Black, 19 C. B. N. S. 205, 206.

[3] Angus *v.* Dalton, 4 Q. B. D. 162; affirmed Dalton *v.* Angus, 6 App. Cas. 740.

[4] See Peyton *v.* London, 9 B. & C. 725, 735; Brown *v.* Windsor, 1 C. & J. 20; Chadwick *v.* Trower, 8 Scott, 1; Humphries *v.* Brogden, 12 Q. B. 748; Rogers *v.* Taylor, 2 H. & N. 828; Bull. & L. (3rd edit.) 406 n. (*b*). Cf. as to land in its natural state, *ante*, p. 294.

[5] Smith *v.* Martin, 2 Wms. Saund. 802; Jeffries *v.* Williams, 5 Exch. 792; Bibby *v.* Carter, 4 H. & N. 154; Richards *v.* Jenkins, 17 W. R. 32. See also Pountney *v.* Clayton, 31 W. R. 664, *per* Brett, M. R.

[6] Rogers *v.* Taylor, 2 H. & N. 828. Hilton *v.* Whitehead (12 Q. B. 734), in which the contrary is laid down, was decided before the C. L. P. Act of 1852. See the observations upon this case in Rogers *v.* Taylor, *u. s.*

excavations made by owner or third party.

are made by the owner of the land,[1] or by a third party.[2] Thus, if the ownership of the surface and the subjacent mines is in different hands; and the subjacent owner works out his mines, not so as to cause the surface to subside, but so as to put a weight upon a lateral owner, which he would not otherwise have to bear; and the lateral owner subsequently works out his mines; and the surface owner's land then subsides; the lateral owner is not, *primâ facie*, liable. So, if, between the land of a plaintiff and that of a defendant, lies intervening land belonging to a third party; and such intervening land, if it had been allowed to remain unexcavated, would have been sufficient to support the plaintiff's land; and the owner of such intervening land works out the minerals thereunder; and the weight of support is thus put upon the defendant's land; the defendant cannot, *primâ facie*, be prevented from subsequently working his mines, although the plaintiff's land may in consequence subside.[3] For the natural state of the plaintiff's land would, in the latter case, include the benefit which it derived from the support of the intervening land. Indeed, the defendant would not, in such a case, be the plaintiff's neighbour for the purpose of questions relating to support.[4] However, in such a case the plaintiff would appear, upon the happening of the damage, to have a remedy against the intervening owner.[5] And if he brought an action within six years therefrom, such owner would probably be disentitled to plead the Statute of Limitations.[6]

Or by defendant if entitled to make them.

For the above-mentioned purpose it is also immaterial, even although the excavations are made by the defendant himself, provided he is entitled to make them. Thus, where the owner of mines both vertically and laterally adjacent to a surface had contracted for the right to deprive the surface of its vertical support; and, in pursuance of such right, proceeded to work out the subjacent mines; and, at the same time, proceeded to work out the adjacent mines; it was held, that he was under no

[1] Partridge *v.* Scott, 3 M. & W. 220; Birmingham *v.* Allen, 6 Ch. D. 293, 296.

[2] Birmingham *v.* Allen, *u. s.*, 284, 288, *et seq.*

[3] *Ib.*

[4] *Ib.* pp. 289, 293, 297, *per* Jessel, M.R., and James and Brett, L.JJ. See Dalton *v.* Angus, 6 App. Cas. 755, 827. See *ante*, p. 291.

[5] Birmingham *v.* Allen, *u. s.*, 290, *per* Jessel, M.R.

[6] See *ante*, p. 288.

obligation to bear the additional weight, which would from time to time be thrown on the adjacent land, according as the vertical support was being removed.[1]

(γ) *Principle of* Brown *v.* Robins.

Principle of Brown *v.* Robins.

However, even if land is in its non-natural state, a right still remains, *primâ facie*, for such a degree of support as its owner would have been entitled to, if it had remained in its natural state. Therefore, where land, which has been built upon, is damaged through the withdrawal of its support, its owner will, if he can prove that it would have been damaged even in its natural state, be entitled, *primâ facie*, to a remedy.[2] And, it has been said, that the mere fact, that the land in question was previously weakened by excavations by a third party in another direction, will not relieve from liability a defendant who was aware of the fact.[3] But this is not consistent with the propositions stated in the preceding page; and cannot, it is submitted, be considered law.[4]

(δ) *Remedy for Damage although Right Non-existent.*

Consequent liability for injury to building.

It follows from the last proposition, that, if support is withdrawn from land which has been built upon; and the building is injured; and it is shown, that the land would have been injured, even in its natural state; the remedy, to which the injured party is entitled, cannot be confined to the injury to the land. He will also be entitled to recover in respect of the injury to the building.[5] And if he has suffered a consequential injury to

[1] See Williams *v.* Bagnall, 15 W. R. 272, 276. Under the terms of the contract the mine owner was precluded from entering on the surface, and was therefore compelled to work from the adjoining property; but the decision was independent of this fact. Cf. Woodall *v.* Hingley, 14 L. T. N. S. 167.

[2] Brown *v.* Robins, 4 H. & N. 186; Hunt *v.* Peake, Joh. 712; Stroyan *v.* Knowles, Hamer *v.* Knowles, 6 H. & N. 454; Bell *v.* Love, 10 Q. B. D. 547, 570; and see Backhouse *v.* Bonomi, 9 H. L. Ca. 503.

[3] See Brown *v.* Robins, *u. s.*

[4] See Brown *v.* Robins, *u. s.*, p. 194, *per* Martin, B.

[5] Brown *v.* Robins, *u. s.*, 186; Hunt *v.* Peake, Joh. 713; Stroyan *v.* Knowles, Hamer *v.* Knowles, *u. s.*; Richards *v.* Jenkins, 17 W. R. 34; Chapman *v.* Day, 47 L. T. 705. In the last case the mine owner had,

his trade, in respect of this also he will be entitled to recover.[1] And it is not open to the wrong-doer to contend, that the trade should have been immediately discontinued, to prevent an aggravation of the injury.[2] Had it not been for the wrong-doer's unlawful act, there would have been no injury at all.[3]

Liability for negligence.

Whether the owner of land in its non-natural state may, *primâ facie*, make an adjoining owner liable for removing support, if the removal has been done negligently, is a question not free from doubt. The decisions upon the point are contradictory. According to seven of them, the adjoining owner is liable, if the removal has been done negligently:[4] but it may be that some of that number cannot be regarded as authorities;[5] and others might have been decided upon different grounds.[6] According to one of the decisions, no action is maintainable for removing support, however negligently, to which the plaintiff is not entitled;[7] although, according to another of them, this is only the case, where the defendant is ignorant of the existence and nature of the supported structure.[8] In this conflict reference may be made to the law applicable where land is in its natural state, and where the right of its owner to support has been excluded. He seems nevertheless entitled to a remedy, if the support is withdrawn by reason of the adjoining owner working negligently, or maliciously, or contrary to the custom of the country.[9] There does not seem to be any

upon the severance of the mines from the surface, covenanted to make good all damage caused by his workings, and restore the surface; and it was contended, but without success, that this imposed on the surface owner an implied obligation not to build.

[1] See Stroyan *v.* Knowles, Hamer *v.* Knowles, 6 H. & N. 454.

[2] See *ib.* p. 465.

[3] See Brown *v.* Robins, 4 H. & N. 186.

[4] See Walters *v.* Pfeil, Mood. & M. 362; Massey *v.* Goyder, 4 C. & P. 161; Dudley Canal Co. *v.* Grazebrook, 1 B. & Ad. 65; Dodd *v.* Holme, 1 A. & E. 493; Davis *v.* Lond. & Blackwall Ry. Co., 1 M. & G. 799; Bradbee *v.* Christ's Hospital, 4 M. & G. 714; Woodall *v.* Hingley, 14 L. T. N. S. 167. Angus *v.* Dalton (4 Q. B. D. 204) contains an opinion of Brett, L.J. to the same effect.

[5] Walters *v.* Pfeil, *u. s.*, and Massey *v.* Goyder, *u. s.* are only nisi prius decisions.

[6] In Dodd *v.* Holme, *u. s.*, and Bradbee *v.* Christ's Hospital, *u. s.*, the right of support was not disputed. See Gayford *v.* Nicholls, 9 Exch. 708.

[7] See Gayford *v.* Nicholls, 9 Exch. 702.

[8] See Chadwick *v.* Trower, 8 Scott 1, reversing Trower *v.* Chadwick, 3 *ib.* 699. Cf. Fletcher *v.* Rylands, 3 H. & C. 795, *et seq.* (reversed *ib.* L. R. 1 Exch. 265; Rylands *v.* Fletcher, L. R. 3 H. L. 330); Woodall *v.* Hingley, 14 L. T. N. S. 167.

[9] See *infra*, Sect. 2, *a* (γ).

reason why the law applicable where land is in its natural state, and where it is in its non-natural state, should in this respect be different. It is also to be observed, that, in many of the cases, which in other respects ascertain the relative rights and duties of adjoining owners, the presence or absence of wilfulness or negligence on the part of the defendant has been deemed material.[1] The preponderance both of authority and principle is therefore greatly in favour of the proposition, that negligence entails liability.

Doubtful whether duty to notify intention to withdraw support.

Akin to the preceding question is the further question, whether an adjoining owner is bound to give the owner of land in its non-natural state notice that he intends to withdraw the support. The actual authorities upon this question are conflicting.[2]

(ε) *Value of Land not entitled to have Artificial Weight supported.*

Mordue *v.* Durham.

Although an owner of land, who puts an artificial weight upon it, is not entitled, *primâ facie*, to have such weight supported,[3] he is entitled, *primâ facie*, to put the weight upon it in the first instance.[4] It follows, that, where the owner of land is not entitled to have an artificial weight thereon supported, and the value of the land has for any purpose to be estimated, it is not necessarily estimable with reference merely to the purposes to which the land can be applied in its natural state. In *Mordue* v. *Durham*[5] the defendants sold land to the plaintiff with an exception of mines and minerals. The conveyance reserved extensive powers to the defendants to

[1] See Smith *v.* Kenrick, 7 C. B. 515; Eadon *v.* Jeffcock, L. R. 7 Exch. 395; Smith *v.* Fletcher, 9 *ib.* 64, 67; Crompton *v.* Lea, 19 Eq. 127, 129. Cf. the language of s. 79 of Rail. Cl. Cons. Act, 1845, and s. 23 of Wat. Cl. Act; *ante*, p. 5, n. [13]; p. 9.

[2] The question was answered in the affirmative in Massey *v.* Goyder, 4 C. & P. 161; which was, however, only a nisi prius decision. See also, on this subject, Jones *v.* Bird, 5 B. & Al. 837; Peyton *v.* London, 9 B. & C. 725; Brown *v.* Windsor, 1 Cr. & J. 27. It was answered in the negative in Chadwick *v.* Trower, 8 Scott 1; where, however, the defendant was ignorant of the existence of the wall, which was damaged.

[3] See *ante*, p. 298.

[4] See Mordue *v.* Durham, L. R. 8 C. P. 336; Dalton *v.* Angus, 6 App. Cas. 756.

[5] L. R. 8 C. P. 336.

occupy and use the surface for the purpose of working. It also provided, that it should not be lawful for the plaintiff to do anything whereby the defendants should be hindered in the exercise of the reserved powers; and that the defendants should compensate the plaintiff for damage or spoil of ground to be occasioned by the exercise of the powers. The powers were exercised; and the plaintiff claimed as compensation the value of the land with reference to any purpose to which it might be reasonably considered as applicable. The claim was held to be maintainable.[1]

(ζ) *Statutory Severance.*

Statutory severance.

The principles which, *primâ facie*, determine the right of support for land in its non-natural state, do not exclusively apply, where no evidence as to the time or mode of severance of the two adjoining tenements is producible, or where the instrument of severance is voluntary. They equally apply, where the instrument of severance has been entered into under the provisions of a railway or canal Act, or otherwise has a statutory origin.[2]

Sect. 2.—ACTUAL OR ALLEGED CONTRACT, CUSTOM, OR PRESCRIPTION.

a. Exclusion of Right for Land in Natural State.

(a) *Contract.*

Right of support for land in natural

If apt words are used, whether in the instrument of severance itself;[3] or in a contemporaneous, or a subsequent instrument;[4]

[1] See further, as to this case, *ante*, pp. 275, 276. Cf. the Sc. case of Neill's Trustees *v.* Dixon, 7 Sess. Cas. (4th ser.) 741; a decision on the meaning of "surface damage."

[2] See *ante*, p. 298, n. [1].

[3] See Rowbotham *v.* Wilson, 6 E. & B. 593; 8 *ib.* 123; 8 H. L. Cas. 348; Shafto *v.* Johnson, 8 B. & S. 252 (*n*); Taylor *v.* Shafto, *ib.* 228; Murchie *v.* Black, 19 C. B. N. S. 207; Williams *v.* Bagnall, 15 W. R. 272; Buccleuch *v.* Wakefield, L. R. 4 H. L. 377; Smith *v.* Darby, L. R. 7 Q. B. 716; Eadon *v.* Jeffcock, L. R. 7 Exch. 379; Buchanan *v.* Andrew, L. R. 2 Sc. & D. 288; Aspden *v.* Seddon, 10 Ch. 396 (*n*), 401; *ib.* 1 Exch. D. 496; Gill *v.* Dickinson, 5 Q. B. D. 159; Davis *v.* Treharne, 6 App. Cas. 466, 469; Dalton *v.* Angus, *ib.* 809; Chapman *v.* Day, 47 L. T. 709; Mundy *v.* Rutland, 23 Ch. D. 81, 88, 89; Bell *v.* Love, 10 Q. B. D. 558. This in fact is admitted in Harris *v.* Ryding, 5 M. & W. 60; Humphries *v.* Brogden, 12 Q. B. 745, 757; Smart *v.* Morton, 5 E. & B. 30, 46.

[4] See Rowbotham *v.* Wilson, 6 E. &

and whether in affirmative or negative terms ;[1] and whether in express terms or by plain implication ;[2] and whether the underlying mines are granted or excepted ;[3] and whether the instrument is voluntary or statutory ;[4] the right of support for land in its natural state may be effectually excluded. This was formerly supposed to be impossible, as appears from the *dictum* of Lord Denman in *Hilton* v. *Granville*[5] :—"Even if the grant could be produced in specie, reserving a right in the lord to deprive his grantee of the enjoyment of the thing granted, such a clause must be rejected as repugnant and absurd."[6] It is, however, clear, that if a man grants land ; with an exception of the mines, and with a right to withdraw support from the surface ; a surface may, if the right be exercised, nevertheless belong to the grantee ; although possibly not the same kind of surface as that which belonged to him at the date of the grant.[7] And Lord Denman's *dictum* has been expressly overruled.[8] And of course the right may be partially[9] as well as wholly excluded.

State may be excluded by contract.

It has been laid down, that a proviso in a purchase deed, that the vendor, his heirs or assigns, "tenants or lessees," should not be liable for any damage caused by the sinking of the land through mining operations in getting "the minerals hereby excepted," would enure for the benefit of a lessee holding under an antecedent lease ; such lease having been recited in the deed, and the minerals comprised in the lease having been part of the minerals excepted from the purchase.[10] An owner of land

Incidental consequences of exclusion of right.

B. 604 ; 8 *ib.* 147 ; Murchie *v.* Black, 19 C. B. N. S. 205. Cf. Richards *v.* Harper, L. R. 1 Exch. 205.

[1] See Smith *v.* Darby, L. R. 7 Q. B. 724, *per* Blackburn, J.

[2] See *ib.* 725 ; Aspden *v.* Seddon, 10 Ch. 401 ; Davis *v.* Treharne, 6 App. Cas. 469.

[3] See Williams *v.* Bagnall, 15 W. R. 274, 275, 276.

[4] Bell *v.* Love, 10 Q. B. D. 558, 566.

[5] 5 Q. B. 701.

[6] See p. 730.

[7] See Rowbotham *v.* Wilson, 6 E. & B. 603 ; 8 H. L. Cas. 361, 362 ; Salisbury *v.* Gladstone, 9 H. L. Cas. 703 ; Williams *v.* Bagnall, 15 W. R. 276.

[8] See Rowbotham *v.* Wilson, 8 H. L. Cas. 348. See also Carlyon *v.* Lovering, 1 H. & N. 799 ; Buccleuch *v.* Wakefield, L. R. 4 H. L. 399, 410 ; Buchanan *v.* Andrew, L. R. 2 Sc. & D. 297 ; Hall *v.* Byron, 4 Ch. D. 678 ; Bell *v.* Love, 10 Q. B. D. 561.

[9] In Mundy *v.* Rutland, 23 Ch. D. 81, Kay, J., thought that the provisions of a lease (stated *post*, pp. 320, 321) partially excluded the right of support. The Court of Appeal thought that they were unintelligible.

[10] See Eadon *v.* Jeffcock, L. R. 7 Exch. 379, 397, 398, *per* Bramwell, B. Cf., on this point, Davis *v.* Treharne, 6 App. Cas. 460 ; *post*, p. 332, n. [4].

in its natural state, whose right of support is excluded by contract, may nevertheless be entitled to a remedy, if the damage which he sustains has been occasioned by the working of minerals not the subject of that contract. If, for example, upon a sale or lease of lands the mines are excepted, with liberty to get them without being liable for any damage; and the mine owner is also the owner of mines which laterally adjoin; and he does not work the excepted mines, but works the lateral mines; and his workings damage the land sold or demised; he may be liable.[1]

(β) *Custom and Prescription.*

Right may also be excluded by custom, if making compensation is a part.

The right of support for land in its natural state may also apparently be excluded by custom, if it is a part of the custom that compensation shall be made for all damage.[2]

According to Hilton *v.* Granville may not otherwise by custom, and may not by prescription.

In *Hilton* v. *Granville*[3] an action was brought by a copyholder against his lord's lessee for working minerals under the copyhold parcel in such a way as to withdraw support therefrom; and from two ancient copyhold houses, which had been built thereon.[4] Two pleas were, amongst others, put in: a prescriptive right so to work without making any compensation for the damage to be done, and a custom so to work from time immemorial without making any compensation. Both pleas were held bad. This decision was treated as sound in *Salisbury*

[1] See Whitehouse *v.* Bayley, 34 L. T. 93; Aspden *v.* Seddon, 1 Ex. D. 505. In Whitehouse *v.* Bayley, the plaintiff's buildings were damaged, but the land would have been damaged even if unbuilt upon: see as to this, *ante*, p. 301. He might have been free from liability, if he had postponed the working of the lateral mines until after he had worked the excepted mines: see *ante*, p. 300.

[2] See Aspden *v.* Seddon, 1 Exch. D. 503, 510, *per* Mellish, L. J. See also the observations of Lord Hatherley in Buccleuch *v.* Wakefield, L. R. 4 H. L. 395, 396, 399. Cf. Smart *v.* Morton, 5 E. & B. 30. There a custom to work so as to let down the surface, paying compensation for the injury so caused, was alleged to exist at the time of the injury complained of. The plea of such a custom was held bad; but upon the ground, that the existence of the custom was not sufficiently proved.

[3] 5 Q. B. 701.

[4] The principle of the decision was not affected by the fact that houses were upon the land. The pleas were not confined to newly built houses, but were so wide as to embrace houses coeval with the custom itself; as to which a grant of the right of support would, in the absence of the custom, be implied: see *infra*, *b*. (β).

v. *Gladstone*,[1] was acted on in *Blackett* v. *Bradley*,[2] and was approved in *Bell* v. *Love*;[3] and it has never been, as a decision, either overruled or disapproved. However, its correctness, as a decision, that a custom so to work is invalid, is hardly consistent with many of the observations of Lord Cottenham, when the same case was in Chancery;[4] and certainly was not treated as being beyond doubt in *Buccleuch* v. *Wakefield*.[5]

But Hilton *v.* Granville probably wrong as to custom.

The following reasons may be urged in favour of the view, that *Hilton* v. *Granville* is not, in that respect, good law:— (1.) The lawfulness of a grant of the right to disturb the surface is now beyond doubt.[6] But when *Hilton* v. *Granville* was decided, such a grant was supposed to be unlawful;[7] and it is difficult to say how far the decision may not have been due to this erroneous notion. (2.) It seems reasonable to conclude (all customs being supposed to have their origin in grants), that a custom may be valid, if a grant, which could create it, could have been valid. (3.) The main ground, upon which the decision proceeded, was, that a customary right to disturb the surface is repugnant to the right of the surface owner to support; is, therefore, unreasonable; and, being unreasonable, wants one of the requisites of a good custom.[8] It does not, however, appear to be the fact, that a customary right to disturb a surface is repugnant to the right of the surface owner to support. A similar argument was disregarded in the case of a grant.[9] And there is no reason why a custom and a grant should in this respect stand upon a different footing.[10] And (4) a customary right to disturb a surface, paying compensation for the damage so caused, appears to be without doubt a good custom.[11] But if a payment from time to time, as and when damage is caused, is sufficient to give validity to a custom, a payment once for all at

[1] 9 H. L. C. 692, 702.

[2] 1 B. & S. 940: overruled in Gill v. Dickinson, 5 Q. B. D. 159.

[3] 10 Q. B. D. 561, *per* Baggallay, L. J.

[4] 1 Cr. & Ph. 283, 294, 295.

[5] L. R. 4 H. L. 399, *per* Lord Hatherley: 406, 410, *per* Lord Chelmsford. It was followed in the reversed decision in the court below: see Wakefield *v.* Buccleuch, 4 Eq. 650—653.

[6] *Ante*, pp. 304, 305.

[7] See Lord Denman's dictum in this very case, cited *ante*, p. 305.

[8] See *ante*, p. 90, n. [2].

[9] See *ante*, p. 305.

[10] See the observations of Lord Cottenham in Hilton *v.* Granville, 1 Cr. & Ph. 293, 294.

[11] See *ante*, p. 306.

the origin of the custom should for that purpose be equally effectual. And a payment, or something equivalent to a payment, may reasonably be presumed to have then taken place. The first of these reasons may not perhaps be entitled to much consideration. As against the second, it may be urged, that the lawfulness of a custom does not necessarily follow from the lawfulness of a grant. "Though the parties may have legally made such a contract, it would not be reasonable to presume that they had done so."[1] It may be doubted, however, whether this objection is sufficient to dispose of the second reason; and it is difficult to see what objection can be urged against the third or the fourth. Upon the whole, therefore, it is submitted, that *Hilton* v. *Granville* would not, in the above respect, be followed at the present day.[2] If a custom to disturb the surface without paying any compensation may now be considered good, it must, at all events, be conclusively shown to exist;[3] and to have existed at the time when the severance of the adjoining tenements took place.[4]

And prescription and custom on similar footing.

No reason exists why the same remarks should not equally well apply to a plea of a prescriptive right so to work as to disturb the surface.[5]

Freeholds and copyholds.

Wastes.

As regards the validity of pleas of rights by custom or prescription to withdraw support from a surface, there is no distinction between freeholds and copyholds.[6] In *Gill* v. *Dickinson*[7] an action was brought by the owner of an allotment of waste land within a manor against a lessee under the lord for working minerals under the allotment in such a way as to withdraw support therefrom. The defendant pleaded (amongst other things) an immemorial custom in the lord and his assigns to work the minerals under the wastes without leaving support, and without making any satisfaction

[1] See Blackett *v.* Bradley, 1 B. & S. 953, *per* Blackburn, J.; Bell *v.* Love, 10 Q. B. D. 561, *per* Baggallay, L.J.

[2] As to a custom being said to be void, because it is unreasonable, see *ante*, p. 90, n. [2].

[3] See Smart *v.* Morton, 5 E. & B. 30; Bell *v.* Love, 10 Q. B. D. 560.

[4] See Smart *v.* Morton, *u. s.*

[5] See Hilton *v.* Granville, 5 Q. B. 701. Cf. the observations of Lord Wensleydale in Rowbotham *v.* Wilson, 8 H. L. C. 363.

[6] See Hilton *v.* Granville, *u. s.*

[7] 5 Q. B. D. 159.

for the injury thereby caused. It was held,[1] that the case was not governed by the decision in *Hilton* v. *Granville;*[2] and judgment was given for the defendant. It may possibly be, that a custom to mine under copyholds without leaving support for the surface is bad, as being unreasonable.[3] But it does not follow, that a custom to mine under a waste is bad.[4] Indeed, independently of custom, the lord is, as has been already seen,[5] entitled, in working under the wastes, to withdraw support from the surface; provided only he leaves a sufficiency of common.

(γ) *Remedy for Damage although Right excluded.*

Liability under contract or custom.

An owner of land in its natural state, whose right of support is excluded, is frequently entitled to compensation for the damage he may sustain; either by the terms of the instrument by which his right is excluded; or, if it can be validly excluded by custom,[6] by such custom.[7] Where an instrument, which excludes the right of a surface owner to support, provides that he shall be compensated for all damage which he may thereby sustain, the burden of the liability to make such compensation runs with the land.[8] Where the right of support for land in its natural state has been excluded, the adjoining owner may, nevertheless, it would seem, be liable, if he works negligently, or maliciously, or contrary to the custom of the country.[9]

Liability through negligent or malicious or unusual working.

(δ) *Subsequent Acquisition of Excluded Right.*

Where the right of support for land in its natural state has

Subsequent acquisition by

[1] Overruling Blackett *v.* Bradley, 1 B. & S. 940. In Bell *v.* Love (10 Q. B. D. 561) Baggallay, L.J., expressed (although extra-judicially) approval of the decision in Blackett *v.* Bradley. His Lordship's attention, however, was not apparently called to Gill *v.* Dickinson.

[2] *Ante*, p. 306.

[3] See, as to this, the three preceding pages.

[4] See also Buccleuch *v.* Wakefield, L. R. 4 H. L. 406, 410 (*per* Lord Chelmsford), where it is said, that a custom applicable to the customary tenancies of a manor is no authority for the right of working mines with reference to the wastes.

[5] See *ante*, p. 295.

[6] See the three preceding pages.

[7] See *ante*, p. 306.

[8] Aspden *v.* Seddon; Preston *v.* Seddon; 1 Exch. D. 496.

[9] See Rowbotham *v.* Wilson, 6 E. & B. 593, 602; 8 *ib.* 123; 8 H. L. C. 348; Eadon *v.* Jeffcock, L. R. 7 Exch. 393, 394; Buchanan *v.* Andrew, L. R. 2 Sc. & D. 292, 296. Cf. Smith *v.* Kenrick, 7 C. B. 515; Smith *v.* Fletcher, L. R. 9 Exch. 64, 67; Crompton *v.* Lea, 19 Eq. 127, 129.

prescription probably impossible.

been excluded, it cannot, apparently, be subsequently acquired by prescription.[1] It would be impossible, in such a case, to show an enjoyment as of right.

b. Acquisition of Right for Land in Non-Natural State.

(*a*) *Express Grant.*

Right of support for land in non-natural state may be acquired by express grant.

A right of support for land in its non-natural state may be acquired by express grant or reservation; whether voluntary,[2] or statutory. As instances of statutory acquisitions it may be mentioned, that provisions are made for the preservation of dwellinghouses under the Act 7 & 8 Vict. c. 105;[3] of houses and other buildings under the Cornwall Subm. Mines Act, 1858;[4] of piers and other structures under the Crown Lands Act, 1866;[5] and (in the case of mines excepted from a grant of lands in Ireland) of places of worship, graveyards, cemeteries, public schools, houses, and outhouses, under the Act 23 & 24 Vict. c. 154.[6]

(*β*) *Implied Grant.*

Or by implied grant, as where at time of severance weight actually on land.

The right may also be acquired by implied grant or reservation.[7] If, for instance, the weight caused by buildings, or by an artificial watercourse, be upon land at the time when such land is severed from the adjoining land, there is, *primâ facie*, an implied grant or reservation, as the case may be, of the right of support for such buildings or watercourse.[8]

[1] This question was suggested in Rowbotham *v.* Wilson, 6 E. & B. 593.

[2] See Brown *v.* Windsor, 1 Cr. & J. 20; Bonomi *v.* Backhouse, E. B. & E. 655; Angus *v.* Dalton, 4 Q. B. D. 162, 169, 170, 197; Dalton *v.* Angus, 6 App. Cas. 792.

[3] Giving working powers to the Duke of Cornwall: *ante*, p. 278.

[4] See *ante*, p. 279.

[5] *Ante*, p. 280.

[6] *Ante*, p. 281.

[7] Bonomi *v.* Backhouse, E. B. & E. 655; Angus *v.* Dalton, 4 Q. B. D. 162, 169.

[8] See Wyrley Canal Co. *v.* Bradley, 7 East, 368, 372; Richards *v.* Rose, 9 Exch. 218; Gayford *v.* Nicholls, *ib.* 708; Caledonian R. Co. *v.* Sprot, 2 Macq. 451; Murchie *v.* Black, 19 C. B. N. S. 205; Richards *v.* Jenkins, 17 W. R. 30; Dalton *v.* Angus, 6 App. Cas. 792, 826; Rigby *v.* Bennett, 21 Ch. D. 567: and cf. Pyer *v.* Carter, 1 H. & N. 916; Dugdale *v.* Robertson, 3 K. & J. 695, 700. In Caledonian R. Co. *v.* Sprot, *u. s.*, it was said, that, what a grantor grants, is such a measure of support "as is necessary for the land in its condition at the time of the grant:" see p. 451. By the grant is of course meant the last grant, if there have been more than one: Richards *v.* Jenkins, *u. s.*, 33.

Or avowedly intended to be put there.

So, where land is purchased, or excepted from a purchase, for a particular object, and such object is known to both parties at the time of the purchase, there is, *primâ facie*, an implied grant or reservation, as the case may be, of a reasonable degree of support for the due execution of that object.[1] Therefore, where the avowed object of a purchase of land is the erection thereon of a building, or a railway, or a canal, the purchaser purchases, *primâ facie*, by implication, the right of support for such building, railway, or canal.[2] And, whether the purchase be voluntary, or effected under the compulsory powers of an Act of Parliament;[3] or the object be, or be not, stated in the instrument of purchase;[4] is wholly immaterial.[5] And however the building, railway, or canal may be used, or to whatever purposes it may be applied, is also wholly immaterial.[6] Where the owner of two adjoining tenements sells one of them, excepting the underlying mines; and stipulating, that he shall not be liable for any damage, which their working may cause; his stipulation, according to a principle already stated,[7] does not exempt him from liability for damage to that tenement by lateral workings under the other tenement. And if he sells it for the erection of buildings, his stipulation may not exempt him from liability for damage to those buildings by such lateral workings; although, if it had been unburdened

[1] See Caledonian R. Co. *v.* Sprot, 2 Macq. 451, 452; N. E. R. Co. *v.* Elliot, 1 J. & H. 153; Elliot *v.* N. E. R. Co., 10 H. L. C. 357, 362; N. E. R. Co. *v.* Crosland, 4 De G. F. & J. 559; G. W. R. Co. *v.* Bennett, L. R. 2 H. L. 40; Aspden *v.* Seddon, 10 Ch. 401; *ib.* 1 Ex. D. 506; Siddons *v.* Short, 2 C. P. D. 577; Rigby *v.* Bennett, 21 Ch. D. 567, 569.

[2] See Caledonian R. Co. *v.* Sprot, 2 Macq. 451, 452; Elliot *v.* N. E. R. Co., 10 H. L. Cas. 357, 362; Siddons *v.* Short, 2 C. P. D. 572, 577; Dixon *v.* Cal. Comp. 5 App. Cas. 829: Dalton *v.* Angus, 6 *ib.* 792, 826; Pountney *v.* Clayton, 31 W. R. 665, 667. Cf. Met. Bd. *v.* Met. R. Co., L. R. 3 C. P. 612; 4 *ib.* 192.

[3] See Siddons *v.* Short, *u. s.*; Dixon *v.* Caledonian R. Co., 5 App. Cas. 829. See also *ante*, p. 298, n. [1], and cases there cited.

[4] See Siddons *v.* Short, *u. s.*

[5] If, on the other hand, a grant is made for such a purpose as that of grazing, and the grantee builds a railway, he will, if the support be removed, be, *primâ facie*, without a remedy: see Caledonian R. Co. *v.* Sprot, 2 Macq. 451.

[6] Caledonian R. Co. *v.* Sprot, 2 Macq. 462; N. E. R. Co. *v.* Elliot, 2 De G. F. & J. 432. The *primâ facie* position may be modified by circumstances: see Rigby *v.* Bennett, 21 Ch. D. 567, *et seq.*

[7] See *ante*, p. 305.

by buildings, the workings would not have caused it to come down.[1]

Sewers.

According to similar principles the provisions of the Pub. Health Act, 1875, obliging every local authority to keep in repair all sewers belonging to them, and to make all necessary sewers; and empowering them, after giving reasonable notice to the owner or occupier, "to carry any sewer into, through, or under any lands whatsoever within their district," making compensation to all persons injured;[2] give them by implication the right to have sewers made under the powers of the Act, supported by the subjacent minerals. The powers of the Act might otherwise be inoperative.[3] And the right is not confined to those parts of the subjacent minerals which lie mathematically beneath the sewers.[4] But whether the Act also gives an implied right of general lateral support is doubtful.[5]

Gas mains and pipes.

In like manner, where an Act of Parliament vested gas mains and gas pipes in a company, and provided for their maintenance; and empowered[6] the company to lay down, and from time to time maintain, additional and other mains and pipes, and to do all such acts as they might think proper for supplying gas; they were held entitled to have both the original, and additional or other, mains and pipes supported by the subjacent minerals.[7] But it would have been otherwise, if they had acted without such statutory powers. For they would then have been wrongdoers from the beginning.[8]

Or even where possible future weight contemplated.

And, even if it be merely shown to have been within the contemplation of the parties to a purchase, that an artificial weight might, at a then future time, be placed upon the land purchased or excepted, a grant or reservation will, *primâ facie*, be implied of a reasonable degree of support for that weight. Thus, where, upon a sale of land, the purchaser covenanted, that the land, "or any buildings now or hereafter to be erected

[1] See Aspden *v.* Seddon, 1 Exch. D. 506.

[2] See ss. 15, 16, 308.

[3] See *Re* Dudley, 8 Q. B. D. 86.

[4] See *ib.* pp. 93, 94, 95, 96.

[5] *Ib.* S. 334, providing that nothing in the Act should be construed to extend to mines, merely applies to nuisances: *ante*, p. 148.

[6] Besides containing an express provision on the subject, the Act in question incorporated the Gas. Cl. Act, 1847 (10 & 11 Vict. c. 15).

[7] Normanton Gas Co. *v.* Pope, 48 L. T. 666; affirmed 52 L. J. Q. B. 629.

[8] See *ib.*

thereon," should not be used for certain specified purposes, it was held, that the vendor was liable for so working mines as to injure buildings which had been erected subsequently to the sale.[1]

No implied right for reasonable weight.

There are no other means by which a grant or reservation of the right of support for land in its non-natural state can be implied. There is no authority[2] for the proposition, which has been sometimes advocated or suggested,[3] that the owner of a surface ought, in every case, to have, *primâ facie*, a right of support for all reasonable buildings which may be put upon it. Refusing to accept it can hardly, it may be observed, in any case, involve hardship. For, if a man's house is injured by mining operations, and he can show, that his land would have been injured, even if it had been in its natural state, he will, although having no right of support for the house, be entitled to damages, not merely in respect of the land, but also in respect of the house.[4]

(γ) *Prescription—Enjoyment since Legal Memory.*

Right may also be acquired by enjoyment since legal memory.

The right of support for land in its non-natural state may be acquired by enjoyment from the time of legal memory.[5] And where the right is claimed on this ground, the claim to it cannot be defeated by reason only, that actual proof is given, by scientific or other evidence, that the non-natural state must of necessity have originated at a time later than that of legal memory.[6] The fiction of a grant made and lost in modern times may, it seems, be applied, so as to destroy the effect which such proof might otherwise have.[7]

[1] Berkeley *v.* Shafto, 15 C. B. N. S. 79.

[2] See Dalton *v.* Angus, 6 App. Cas. 804, 808, *per* Lord Penzance: and see 763. See also Richards *v.* Jenkins, 17 W. R. 33, *per* Channell, B.

[3] See Rogers *v.* Taylor, 2 H. & N. 828; Richards *v.* Jenkins, 17 W. R. 32; Dalton *v.* Angus, 6 App. Cas. 749, 772: see also Brown *v.* Robins, 4 H. & N. 190, 193.

[4] See *ante*, p. 301.

[5] Angus *v.* Dalton, 4 Q. B. D. 162, 170, 171, 185, 186; Dalton *v.* Angus, 6 App. Cas. 762, 763, 783, 784, 810. See Bell *v.* Love, 10 Q. B. D. 559, 560.

[6] Angus *v.* Dalton, *u. s.*, 172, 186, 199.

[7] *Ib.* 172, *per* Thesiger, L. J.

(δ) *Prescription—Enjoyment for Twenty Years.*

Or by enjoyment for twenty years.

The right of support for land in its non-natural state may also be acquired by an adverse enjoyment for twenty years.[1] However, an enjoyment for twenty years can only confer the right, if the servient owner was capable of making a grant.[2] No such right can, for example, be obtained against a lunatic.[3] And an enjoyment for twenty years can only confer the right, if the servient owner knew or might have known, that some alterations as to support were being made.[4] But if he had or might have had this knowledge, it is not necessary that he should also have been aware of the extent or details of the alterations.[5] And an enjoyment for twenty years cannot confer the right, if the person claiming it has practised deception or concealment. If a person, who knows that an artificial weight is being in fact imposed, makes inquiries as to its extent or details, and receives false or misleading information, no right can be acquired against him by prescription. And if the weight is imposed secretly or surreptitiously, so as to keep material facts from his knowledge, his position is the same.[6]

Former doubts, whether claim could not be defeated if enjoyment dissented from.

Whether, after the right has been in point of fact enjoyed for twenty years, the claim to it cannot be defeated by mere proof, that the enjoyment was never actually assented to, or was dissented from, was formerly not free from doubt. For it was a received doctrine, that the right of support for land in its non-natural state is only a negative or passive easement;[7] not susceptible of interruption by the servient owner; and not, therefore, an easement obtainable by twenty years' enjoyment within the meaning of s. 2 of the Prescription Act.[8] The

[1] Rogers *v.* Taylor, 2 H. & N. 828. See also Richards *v.* Jenkins, 17 W. R. 31, 33; Angus *v.* Dalton, 4 Q. B. D. 162, 170, 171, 185, 186, 201; Dalton *v.* Angus, 6 App. Cas. 794, 801.

[2] Angus *v.* Dalton, *u. s.*, 162, 170, 171, 185, 186.

[3] *Ib.* 174, 186; Dalton *v.* Angus, *u. s.*, 751, 771, 827.

[4] Dalton *v.* Angus, *u. s.*, 801, 828: but see 779.

[5] *Ib.* 801, 802, 828.

[6] *Ib.* 802, 827, 828. See Lemaitre *v.* Davis, 19 Ch. D. 281.

[7] Angus *v.* Dalton, *u. s.*, 197, 203; Dalton *v.* Angus, *u. s.*, 776.

[8] 2 & 3 Will. 4, c. 71. "No claim, which may be lawfully made at the common law by custom, prescription, or grant to any way or other easement, or to any watercourse, or the use of any water to be enjoyed, &c.,

statute, therefore, having regard to this doctrine, gave no facilities for answering the above question.[1] Moreover, although there were numerous cases containing dicta on the subject;[2] and although such cases showed a great preponderance of opinion in favour of the proposition, that the claim could not be so defeated;[3] the reasons urged against it were of the greatest weight.[4] How was the acquisition of the right to be resisted? Was a man obliged, in order to resist it, to remove the support within the twenty years? If he did, he would or might, in pulling down his neighbour's property, also injure or ruin his own; and that, when his interest did not require it; and when, therefore, nothing but grievous loss would ensue to both parties. He would too run the risk of having it shown, that his neighbour's property even in its natural state would

when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way and other matter was first enjoyed at any time prior to such period of twenty years; but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated, &c." See Solomon *v.* Vintners' Co. 4 H. & N. 599.

[1] See Webb *v.* Bird, 10 C. B. N. S. 283, *per* Erle, C. J.; Arkwright *v.* Gell, 5 M. & W. 233; Angus *v.* Dalton, 3 Q. B. D. 85; 4 *ib.* 162, 170, 185, 197, 198; Dalton *v.* Angus, 6 App. Cas. 742, 764. The statement in Hyde *v.* Thornborough, 2 C. & K. 254, that the right in question is within 2 & 3 Will. 4, c. 71, s. 2, was regarded as erroneous.

[2] See Palmer *v.* Fleshees, 1 Sid. 167; Stansell *v.* Jollard, 1 Selw. N. P. 11th edit. 457; Brown *v.* Windsor, 1 Cr. & J. 20; Wyatt *v.* Harrison, 3 B. & Ad. 871; Dodd *v.* Holme, 1 A. & E. 493; Partridge *v.* Scott, 3 M. & W. 220; Hyde *v.* Thornborough, 2 C. & K. 254; Humphries *v.* Brogden, 12 Q. B. 749; Gayford *v.* Nicholls, 9 Exch. 708; Rowbotham *v.* Wilson, 8 E. & B. 140, 142; Rogers *v.* Taylor, 2 H. & N. 828; Brown *v.* Robins, 4 *ib.* 186, 190; Solomon *v.* Vintners' Co., *ib.* 598, 599, 602; Hunt *v.* Peake, Joh. 711; Bonomi *v.* Backhouse, E. B. & E. 655; Richards *v.* Jenkins, 17 W. R. 31, 33. See also Met. Bd. Wks. *v.* Met. R. C., L. R. 3 C. P. 622; and cf. Woodall *v.* Hingley, 14 L. T. N. S. 167.

[3] Dicta in favour of the proposition are expressed more or less broadly in most of the cases cited in the preceding note, except Brown *v.* Robins, and Solomon *v.* Vintners' Co. The latter cases contain dicta expressly against it; but it should be observed, that in Solomon *v.* Vintners' Co. the actual decision was upon a claim to the right of support for a house from (not adjoining soil, but) another house not immediately adjoining. Woodall *v.* Hingley, *u. s.* (a case of honey-combed land), also contains a dictum against the proposition.

[4] See Arkright *v.* Gell, 5 M. & W. 203; Solomon *v.* Vintners' Co., *u. s.*, p. 599. See also Dalton *v.* Angus, 6 App. Cas. 764, 775, 779, 805, 806, 807.

have fallen by the withdrawal of the support,[1] and of being made liable accordingly.[2] It would be a reproach to the law, if, to prevent the acquisition of the right, it were necessary to resort to a course so irrational and so perilous. On the other hand, was a man obliged, in order to resist the acquisition of the right, to bring an action? If so, upon what principle could such an action be supported? For the dominant owner, in imposing the artificial weight in the first instance, was clearly acting within his lawful rights.[3]

Dalton v. Angus.

These reasons were fully considered in *Dalton* v. *Angus*,[4] where an express decision upon the subject in question was pronounced by the House of Lords. In that case two adjoining houses, which were estimated to be upwards of a hundred years old, had been occupied as dwelling-houses by the respective predecessors in title of the plaintiffs and the defendants until about twenty-seven years before the date of the defendants' excavations. The plaintiffs' predecessor then converted his house into a coach factory; and, in doing so, he concentrated on one particular spot of the defendants' soil a weight, to which the entire range of that soil had previously contributed support. The defendants' predecessor was competent to grant the right of support; and he knew, or might have known, that alterations were in fact being made. The plaintiffs' predecessor acted openly and without deception or concealment; but without having obtained from the defendants' predecessor any grant of the right of support, or any assent to the use of such support. The defendants took down their house, and dug cellars in the soil; and, as the result, the whole factory fell. It was held, that the plaintiff was entitled to recover;[5] and the law applicable to the case was laid down as follows:—

This case shows that claim cannot be so defeated

Uninterrupted enjoyment for twenty years of the right of support for land in its non-natural state raises a presumption of a grant of the right; assuming, that the servient owner was competent to make a grant, knew or might have known that some artificial weight existed, and the dominant owner

[1] See Gale, p. 384.

[2] See *ante*, p. 301.

[3] See Mordue *v.* Durham, L. R. 8 C. P. 336; Dalton *v.* Angus, 6 App. Cas. 756, 764, 775, 784, 796.

[4] 6 App. Cas. 740.

[5] Affirming Angus *v.* Dalton, 4 Q. B. D. 162; which reversed S. C. 3 *ib.* 85.

acted without deception or concealment. And this presumption cannot be rebutted by mere proof by the servient owner, that he had made no grant either at the commencement or during the continuance of the enjoyment; or even that he had positively dissented from the enjoyment. And the acquisition of the right cannot be prevented by any legal proceedings. It can only be prevented by actual physical interruption, however difficult or inconvenient or ruinous to the person interrupting such interruption may be.[1] Indeed, although it was not necessary for the decision, the doctrine, that the right of support for land in its non-natural state is only a negative or passive easement,[2] was in the same case expressly challenged by Lords Selborne and Watson.[3] And it was accordingly laid down by Lord Selborne, that it is an easement within s. 2 of the Prescription Act.[4] Upon this point, however, Lord Blackburn refused in the same case to express an opinion.[5]

(ε) *Generally as to Acquisition.*

In no case can a right of support for land in its non-natural state be acquired, if the person claiming the right is disentitled to support for the land in its natural state.[6] No doubt *Bell* v. *Love*[7] contains observations to the contrary. But they were not necessary for the decision; and cannot, it is submitted, be sustained.[8] In order that a right of support may be acquired for land in its non-natural state, the dominant owner must have acted reasonably and without negligence. If injury to a building or

Necessary that claimant should have support for land in natural state, and should act reasonably and without negligence.

[1] See Angus *v.* Dalton, 4 Q. B. D. 162, 172, 173, 176, 177, 186, 187, *per* Thesiger and Cotton, L. JJ.; Dalton *v.* Angus, 6 App. Cas. 796, 797, 801, 802, *per* Lord Selborne: see also pp. 753, 766, 785, 786. Cf. Sturges *v.* Bridgman, 11 Ch. D. 852.

[2] *Ante*, p. 314.

[3] See Dalton *v.* Angus, *u. s.*, 793, 798, 831, adopting the opinions of Lindley and Bowen, JJ., 763, 784.

[4] *Ib.* 798: see also Lemaitre *v.* Davis, 19 Ch. D. 281, 290, 291. The s. is cited, *ante*, p. 314, n. [5].

[5] Dalton *v.* Angus, *u. s.*, 815.

[6] See Rowbotham *v.* Wilson, 6 E. & B. 593, 605; 8 *ib.* 123; 8 H. L. C. 348, 365.

[7] 10 Q. B. D. 547, 570, 571, *per* Lindley, L.J.; professing to follow Dalton *v.* Angus, *u. s.*, 740.

[8] The main decision in Rowbotham *v.* Wilson, *u. s.*, was frequently referred to in other parts of the case, and was mentioned in his lordship's own judgment. But he could not, it is submitted, have used the observations in question, if his attention had been called to the decision upon the point stated in the text.

a watercourse, which would otherwise have had a prescriptive right to support, can be attributed to the fact that it was in the first instance constructed in an unreasonable manner; or with some serious intrinsic weakness; or with some serious extrinsic weakness, as, for instance, on loose sandy soil, or soil honeycombed by mining operations; its owner cannot, *primâ facie*, recover against the adjoining owner for removing the support.[1] And the same observation applies, where the claim to the right is founded upon an express or an implied grant.[2] However, if, notwithstanding the condition of the dominant tenement, no injury would have occurred but for the acts of the servient owner, the latter will be liable.[3] And in no case is the servient owner justified in accelerating the injury.[4] If he does, the owner of the building or the watercourse may recover in proportion to the damage actually sustained.[5]

(ζ) *Subsequent Loss of Acquired Right.*

And should keep in repair.

On similar principles, if an artificial weight be a building, and the building be not kept in proper repair;[6] or if an artificial weight be a canal, and the canal be not kept properly puddled;[7] and if, in either case, the duty of giving support becomes more onerous; the right will, *primâ facie*, be lost.[8]

c. Construction of Ambiguous Provisions.

Construction of ambiguous provisions.

In most of the cases which have come before the Courts respecting the right of support, where evidence has been produced purporting to regulate the right, there has been extreme

[1] See Dodd *v.* Holme, 1 A. & E. 493; Partridge *v.* Scott, 3 M. & W. 229; Woodall *v.* Hingley, 14 L. T. N. S. 167; Angus *v.* Dalton, 4 Q. B. D. 175, 181; Dalton *v.* Angus, 6 App. Cas. 755, 760, 787, 828.

[2] See and consider the cases cited in the preceding note.

[3] Richards *v.* Jenkins, 17 W. R. 32, 33.

[4] See Dodd *v.* Holme, *u. s.*, 505, 506, 507.

[5] Walters *v.* Pfeil, M. & M. 362; Dodd *v.* Holme, *u. s.*

[6] See Walters *v.* Pfeil, *u. s.*, 362; Dodd *v.* Holme, *u. s.*, 493, 503. If the building had fallen merely in consequence of its infirm condition, the defendants would not have been liable: Dodd *v.* Holme, *u. s.*, p. 506, *per* Taunton, J.

[7] See Staffordshire Canal Co. *v.* Hallen, 6 B. & C. 317.

[8] Of course it may in its turn be acquired as an easement.

difficulty in ascertaining what the intention of the parties, or (in cases decided under Acts of Parliament) of the legislature, really was. It will be remembered, that, in the case of land in its natural state, its owner is entitled, *primâ facie*, to support;[1] and that, in the case of land in its non-natural state, a grant or reservation of the right of support is, under certain circumstances,[2] *primâ facie*, implied. The difficulty, therefore, in the class of cases now in question, has usually been to ascertain, whether or not the provisions used by the parties or the legislature showed an intention, either in the case of land in its natural state, or in the case of land in its non-natural state, to exclude the presumption which the law would otherwise have raised, and to make a contract by which alone the rights of the parties were to be governed. Such provisions, except so far as they can be grouped together,[3] have usually been of four different kinds:—(1) Provisions unconditionally obliging the mine owner to leave minerals unworked[4]: (2) provisions securing compensation to the mine owner either as damages or as purchase money[5]: (3) provisions securing compensation to the surface owner for damage[6]: and (4) provisions relieving the mine owner from liability for damage.[7]

(α) *Generally.*

Right which would otherwise exist not excluded by implication.

A right of support, which would otherwise exist, will not be excluded by mere implication founded upon conjecture.[8] For example, as has been already seen,[9] the usual reservation of a royalty; although pointing at the removal of the demised minerals on a large scale; is not, of itself, sufficient to disturb the presumption, that the right of support is reserved. So the clause commonly inserted in an Inclosure Act, under which the mines are reserved to the lord, of holding and enjoying them "in as full, ample, and beneficial a manner to all intents and purposes" as he could have done in case the Act had not been

[1] *Ante*, pp. 294 *et seq.*
[2] *Ante*, pp. 310 *et seq.*
[3] See *infra* (α).
[4] See *infra* (β).
[5] See *infra* (γ).
[6] See *infra* (δ).
[7] See *infra* (ε).
[8] See Proud *v.* Bates, 34 L. J. Ch. 412; Davis *v.* Treharne, 6 App. Cas. 460.
[9] *Ante*, p. 297.

made, is not, of itself, sufficient to disturb the presumption, that the right of support is granted. A right of holding and enjoying mines is merely incidental to their ownership. And it is immaterial, that, before the Act, the lord might have worked without regard to the support, provided he left a sufficiency of common.[1] By the Act the rights of the commoners become freehold rights; and the clause in question must therefore be read with reference to such freehold rights, and so as not to prejudice them.[2] So the clause commonly inserted in an instrument of severance giving full liberties of working and winning is not, of itself, sufficient to disturb the presumption, that the right of support is granted or reserved.[3] Such a clause only gives to the mine owner in express words what, in its absence, he would have by implication.[4] So the facts, that a lessee has covenanted to work "in the usual and most approved way" in which other works of the like kind are performed in the district in question, and has complied with his covenant, will not relieve him from liability for withdrawing support, if on other grounds he would have been liable.[5] And it is immaterial, that the common mode of working in such district is to work up to the barrier, and then, in coming back, to cut away the pillars which are left.[6] Such a covenant merely refers to the manner of working for mining purposes,[7] and consistently with the other legal rights of the parties.[8]

Mundy *v.* Rutland.

Mundy v. *Rutland*[9] was decided on similar principles. There the owner of land, under which were several strata of coal, demised one of the upper strata to the plaintiff; reserving to himself and his lessees the right of working any

[1] See *ante*, p. 295.

[2] See Bell *v.* Love, 10 Q. B. D. 547, 565—570.

[3] See Harris *v.* Ryding, 5 M. & W. 60; Smart *v.* Morton, 5 E. & B. 30; Roberts *v.* Haines, 6 *ib.* 643; Haines *v.* Roberts, 7 *ib.* 625; Cal. R. Co. *v.* Sprot, 2 Macq. 449; Proud *v.* Bates, 34 L. J. Ch. 406, 412; Bell *v.* Wilson, 1 Ch. 303; Hext *v.* Gill, 7 Ch. 714; Buchanan *v.* Andrew, L. R. 2 Sc. & D. 290; Aspden *v.* Seddon, 10 Ch. 402; Bell *v.* Love, *u. s.*, 562, 563, 570. Cf. Dugdale *v.* Robertson, 3 K. & J. 695; Davis *v.* Treharne, 6 App. Cas. 460. See, however, Rowbotham *v.* Wilson, 8 H. L. Cas. 363, 364.

[4] See *ante*, pp. 273, 274.

[5] See Buchanan *v.* Andrew, *u. s.*, 292; Davis *v.* Treharne, *u. s.*, 464.

[6] See Shafto *v.* Johnson, 8 B. & S. 256 n.

[7] Davis *v.* Treharne, *u. s.*, 464.

[8] Shafto *v.* Johnson, *u. s.* The dicta to the contrary in Eadon *v.* Jeffcock, L. R. 7 Exch. 389, cannot be sustained.

[9] 23 Ch. D. 81.

coal not included in that demise, and the same powers and privileges with respect to such last-mentioned coal as if that demise had not been made; provided, that in exercising such powers and privileges the working of the coal then demised should not be prevented or "unnecessarily interfered with," and that compensation should be made to the plaintiff, for any "necessary interference" with the workings. It was held,[1] that the provisions of the lease were unintelligible, and could not determine the rights of the parties; and that, if the lessor wished to reserve the right of withdrawing support from the demised stratum, he should have done so in plain terms.

Right which would otherwise be excluded not preserved by implication.

On the other hand, an instrument, which would otherwise be construed as excluding the right of support, will not be construed as preserving it on the mere ground, that it requires the minerals to be "properly worked."[2]

(β) *Provisions unconditionally obliging Mine Owner to leave Minerals unworked.*

Haines v. Roberts.

In *Haines* v. *Roberts*[3] an Inclosure Act, after giving power to allot the common and waste lands of a manor, enacted, that it should be lawful for the lord of the manor to enter upon the allotments to search for and get coal, &c. It also enacted, that the lord should not open any work on the surface within forty yards of any dwelling-house then or thereafter to be erected, nor get any coal or ironstone under such dwelling-house within the perpendicular distance of forty yards from the foundations. It was held, that the prohibition against working within forty yards did not entitle the lord to work at a greater distance in such a manner as to interfere with the right of support.[4] In *Dugdale* v. *Robertson*[5] the mines under 514 acres of land,[6]

Dugdale v. Robertson.

[1] By the Court of Appeal. Kay, J., thought, that the lease partially excluded the right of support.

[2] Buchanan *v.* Andrew, L. R. 2 Sc. & D. 292.

[3] 7 E. & B. 625, affirming Roberts *v.* Haines, 6 *ib.* 643.

[4] As the result of the working the dwelling-house was injured. But the jury found, that even without the weight of the house, the ground would have given way: see, upon this point, *ante*, p. 301. And, having regard to the reference to houses in the Act, there was an implied right of support for the house: see *ante*, pp. 311, 312.

[5] 3 K. & J. 605. See also *ante*, pp. 212, 213.

[6] And not merely, it will be observed, a particular bed of coal: cf.,

delineated on a plan attached to the lease, were demised to the defendants; with full liberty to work them, and to open pits, &c., except in or upon certain demesne lands belonging to a mansion, and consisting of about four acres; provided that all pits or works sunk or raised for the purpose of working the minerals under certain ornamental grounds, surrounding the demesne lands, and coloured yellow upon the plan, should be sunk and raised at the furthest point from the mansion-house at the part coloured yellow. The defendants proceeded (but without infringing the special provisions) to excavate under the lands coloured yellow, and the mansion in consequence began to give way. On a bill being filed by the successors of the lessor, it was held, that the plaintiffs were entitled to the benefit both of the special provisions and of the *primâ facie* right.

Shafto *v.* Johnson.

A different construction was adopted in *Shafto* v. *Johnson*.[1] There the plaintiff's testator granted a lease of coal mines, in which the lessees covenanted to work the colliery in a proper manner, and according to the best and most approved method of working, and so as to produce with safety the greatest quantity of merchantable coals from and out of each and every of the workable seams thereof; and not knowingly to do or suffer to be done any wilful or negligent act, which might endanger the colliery, or occasion any loss thereto; and not to sink pits within 200 yards of a dwelling-house; and to leave unwrought the coal under a mansion-house, and under certain specified gardens, pleasure grounds, and parks. The lease contained other provisions for the security of these specified portions of the surface, and for making compensation for damage to the portions not specially protected. On a bill for an injunction to restrain the lessees from working without leaving sufficient support for the portions of the surface not specially protected, it was held, that the whole provisions of the lease taken together showed a sufficient intention to exclude the right of support. It was considered, that the leading features of the lease were (1) the intention, in preference to everything

on this point, Eadon *v.* Jeffcock, L. R. 7 Exch. 379.

[1] 8 B. & S. 252 n.

else, to provide for the safety of the mine; and (2) the covenant (not by way of privilege to the lessees, but by way of positive obligation upon them, and for the benefit of the lessor) to get all the coal, which could be got with safety to the mine.[1] So in *Eadon* v. *Jeffcock*.[2] There a particular bed of coal (exclusive of those lying under it) was demised with working powers to persons through whom the defendants claimed. The lease reserved a minimum rent of £200 as for 2 a. 1 r. 16 p., and a further yearly rent of £85 per acre for coal actually got beyond the 2 a. 1 r. 16 p., "including all ribs and pillars left in working the coal," except certain pillars of specified dimensions, which the lessees bound themselves to leave during the whole of the term. The lessees also covenanted to work the mines in a good and workmanlike manner. The plaintiffs claimed under the lessor. The pillars specified in the lease were left. The defendants worked properly; but their working caused a subsidence, and this injured the plaintiffs' land and certain buildings which had been shortly before erected thereon.[3] It was held, that the defendants were not liable for the injury.[4] The facts, that a particular bed of coal only was demised, and that a minimum rent was reserved, were held to form material considerations in construing the lease.[5]

Eadon v. Jeffcock.

(γ) *Provisions securing Compensation to Mine Owner either as Damages or as Purchase Money.*

In *Caledonian R. C.* v. *Sprot*[6] a railway company had been incorporated by an Act passed in 1827. The Act, after giving

Cal. R. C. v. Sprot.

[1] See also Eadon *v.* Jeffcock, L. R. 7 Ex. 389: and cf. Dugdale *v.* Robertson, 3 K. & J. 695, *ante*, p. 321. The construction adopted in Shafto *v.* Johnson was approved in Taylor *v.* Shafto, 8 B. & S. 228, 247. It was there held, that the existence of the lease mentioned in Shafto *v.* Johnson constituted, in a subsequent sale of the surface by the reversioner, a breach of the reversioner's covenant, that the sale was made free from incumbrances; so as to entitle the surface owner to damages for subsidence by reason of the lessees' workings: see *ante*, p. 210.

[2] L. R. 7 Ex. 379.

[3] The land would have subsided without the buildings: see, upon this point, *ante*, p. 301.

[4] *Per* Cleasby and Martin, BB., Bramwell, B., doubting. For observations on some of the dicta in this case, see *ante*, pp. 296, 297.

[5] Cf. Dugdale *v.* Robertson, 3 K. & J. 695; *ante*, p. 321; Chapman *v.* Day, 47 L. T. 705, 709. Cf. also Taylor *v.* St. Helens, 6 Ch. D. 264: see pp. 275, 276.

[6] 2 Macq. 449.

the company compulsory purchasing powers, provided, that it should be lawful for landowners, in selling their lands, to except the mines, and that the company should in that event have no right of property in the mines. The Act also provided, that compensation should be made to any landowner, who should sustain damage through the exercise of any of the powers thereby conferred. In 1834 Sprot conveyed to the company a portion of his land for the purposes of the railway, which the company intended to construct. The deed excepted the mines; with full power to search for, win, and carry away, the minerals. No provision was made as to adjacent or subjacent support. The Caledonian Company derived title from the company incorporated in 1827. In 1850 Sprot proceeded to work underneath the land conveyed, and also underneath his own adjacent land. The Caledonian Company objected to the workings, as being likely to endanger the safety of the railway. Sprot insisted, that they were only entitled to stop the workings upon the terms of compensating him, but this they refused to do. It was considered by the House of Lords, that the compensation mentioned in the Act referred exclusively to the execution by the company of their powers; and that it could not refer to any damage which Sprot might have sustained by his own act in having granted, (if he in fact had granted,) by implication in the deed of 1834 the right of adjacent and subjacent support.[1] It was also considered, according to a principle before stated,[2] that such a grant had in fact been made. It was, therefore, held, that Sprot was not entitled to work, so as to withdraw adjacent or subjacent support.[3]

Elliot *v.* N. E. R. C.

Elliot v. *N. E. R. C.*[4] was a somewhat similar case. There the company had been incorporated by an Act passed in 1834. The Act recited the expediency of making the railway, and of throwing a bridge over a particular river; and it then gave the company compulsory purchasing powers for the purposes of the railway. Sect. 27 reserved to the landowners the mines under the

[1] Cf. R. *v.* Aire and Calder Nav. Co. 30 L. J. Q. B. 337, 351.

[2] *Ante*, pp. 311, 312.

[3] Cf. Caledonian R. C. *v.* Belhaven, 3 Macq. 56. See also Hammersmith, &c., R. C. *v.* Brand, L. R. 4 H. L. 224, *per* Lord Cairns; Aspden *v.* Seddon, 10 Ch. 404.

[4] 10 H. L. C. 333.

lands to be purchased, with full working powers, "so that no damage or obstruction be done or thereby occur to or near such railway or other works."[1] Sect. 28 provided, that, as soon as the landowners in working such mines approached within twenty yards of any masonry or building belonging to the company, they should give notice to the company; that the company might thereupon compel a sale within the twenty yards; and that, if they did not do so, the owners might work, provided they worked in the usual and ordinary manner, and did no avoidable damage. The company purchased land under their powers from various persons, including a Mr. Boulcott; and they then proceeded to construct their railway, and to build their bridge, making one end of the bridge rest on the land purchased from Boulcott. The bridge was finished in 1838, and was of great weight and solidity. The defendant, who was a lessee from Boulcott of the mines under the land purchased, commenced mining operations in 1859 near the bridge, and the suit was instituted to restrain him from withdrawing support. It was contended, that the 27th section should be interpreted by the 28th; that "damage" in the 27th section therefore meant "damage avoidable by reasonable and proper working"; and that the meaning of the two sections taken together was, that the company were entitled to purchase a limited amount of support, and could claim no other support, lateral or vertical. The House of Lords, however, considered, that the two sections were independent of each other; that the Legislature, not unreasonably thinking that the ordinary works of the railway would put but little extra weight upon the surface, intended by sect. 27 to provide for such ordinary works; and that the Legislature intended sect. 28 to apply exclusively to works of weighty masonry. It was, accordingly, held, (1) that the effect of the two sections taken together was, that, except within twenty yards underneath the masonry, (for which special provision was made,) there was no power under any circumstances to work, unless on the condition

[1] Cf. with these words the similar words used in Dudley Canal Co. *v.* Grazebrook, *infra*, p. 327, and the different construction there placed thereon.

of causing no obstruction or damage. And it was held (2) that the working mentioned in sect. 28 meant working under the land conveyed; that this could only refer to subjacent working; and that the implied grant of the right of adjacent support was not, therefore, excluded.[1]

N. E. R. C. *v.* Crossland.

So also in *N. E. R. C.* v. *Crossland*.[2] There an Act of 1830, under which a railway company had been incorporated, authorised the compulsory purchase of land, and reserved the mines under the land purchased to the landowner; but provided, that in working them, "no damage or obstruction be thereby done or occur to or in such railway or works." Soon after the passing of this Act the company purchased land, together with the privilege of making an arched tunnel therein. An Act of 1836, under which another railway company had been incorporated, contained a clause giving them an option of purchasing any minerals the working of which would be likely to injure their railway. In 1844 the property and rights of the first company were purchased by the second company. The plaintiffs derived title from the second company. The defendant, who represented the persons whose land had been purchased, gave notice to the plaintiffs in 1862, that he intended to work the minerals under and on each side of the tunnel; and he called upon the plaintiffs to exercise their option of purchasing them. The plaintiffs, considering, that their rights were governed by the Act of 1830, refused to do this; and they filed a bill for an injunction. It was held, that the Act gave the plaintiffs the right of vertical support for the tunnel, and that the law gave them the right of lateral support as flowing out of the contract.

Dudley Canal Co. *v.* Grazebrook.

Dudley Canal Co. v. *Grazebrook*;[3] was differently decided. There, the company had been incorporated by an Act passed in 1776. The Act, after giving the company power to make a canal, and aqueducts for supplying it, provided, that no owner of any mines should work them within twelve yards from the canal, or under any part of the canal or aqueducts, or under any land lying within twelve yards from either side of the canal or

[1] Affirming N. E. R. C. *v.* Elliot, 2 De G. F. & J. 423, which affirmed S. C. 1 J. & H. 145.

[2] 2 J. & H. 565; 4 De G. F. & J. 550.

[3] 1 B. & Ad. 59.

aqueducts, "except as hereinafter mentioned," without the company's consent. The Act then provided, that, when the owner of any mine lying under the canal or aqueducts, or within twelve yards therefrom, should be desirous of working, he should give the company three months' notice. The company might thereupon inspect the mines, and compel a sale thereof, if they thought proper; and, in default of such inspection or purchase, the owners might work. The Act also provided, that nothing therein contained should defeat the right of the owners to the mines lying under the canal or aqueducts; and that, subject to the conditions in the Act contained, the owners might work the mines, "provided, that in working such mines no injury be done to the said navigation." The canal and aqueducts were made; and in 1827 an owner of land lying under an aqueduct gave the company notice of his desire to work. He then proceeded to work in the ordinary and proper manner, and without doing unnecessary damage; and the aqueduct was in consequence injured. It was contended, that the effect of the words "provided, that in working such mines, no injury be done to the said navigation," was to exclude all power under any circumstances to work except on condition of causing no injury. The court, however, held, that the only way of reconciling these words with the preceding provisions, giving a power to compel a sale of the mines, was to construe "no injury" as meaning "no unnecessary or extraordinary injury;"[1] and that the company were, accordingly, without a remedy.[2] The decision was, therefore, in effect, that the provisions of the Act were inconsistent with a right of subjacent support having been impliedly granted.

Birmingham Canal Co. v. Dudley.

So in *Birmingham Canal Co.* v. *Dudley*;[3] a decision under

[1] Cf. this construction with the construction placed on the words "so that no damage or obstruction be done or thereby occur to or near such railway or other works," in Elliot *v.* N. E. R. C., and on similar words in N. E. R. C. *v.* Crossland; *ante*, pp. 324, 325, 326.

[2] Overruling Birmingham Canal Co. *v.* Hawkesford, 7 East, 371 n. See also Wyrley Canal Co. *v.* Bradley, 7 East, 368, where the Act in question did not contain the words "provided that in working the mines no injury be done to the said navigation;" and where there was, therefore, no such difficulty as that, which arose in Dudley Canal Co. *v.* Grazebrook. See also Stourbridge Canal Co. *v.* Dudley, 3 E. & E. 409; and cf. Dunn *v.* Birmingham Canal Co., L. R. 7 Q. B. 244, 265, 272, 274; 8 *ib.* 42, 46.

[3] 7 H. & N. 969.

the same Act, but under a different section. The section there in question provided, that no owner of mines should carry on any work for getting such mines under any tunnel or within twenty yards of the same without the consent of the company. It was contended, that the words "except as hereinafter mentioned;"[1] did not apply to this section; and that the section accordingly imposed a prohibition in the case of tunnels which was absolute. It was, however, held, that the prohibition was subject to the same exception as that applicable to working within twelve yards; and that the company could not therefore require the minerals within the twenty yards' limit to be left unworked without paying for them.[2]

Mid. R. C. *v.* Checkley.

So in *Midland Rail. Co.* v. *Checkley*.[3] There, a Canal Act reserved the mines and minerals "within and under"[4] the land, through which the canal was to be made, to the owners of the land; and it empowered the owners, (subject to the restrictions thereinafter contained), to work and get such mines and minerals, not thereby injuring the navigation or the works. By subsequent sections the owners of mines were prohibited from getting minerals under or within ten yards from the canal without the consent of the canal proprietors. But the canal proprietors were, if they withheld their consent, required to compensate such owners in the manner provided by the Act. The defendant was the lessee of a quarry adjacent to the canal; and he derived title from the person, who had sold to the proprietors the land on which the canal was made. The defendant commenced working more than ten yards from the canal, but his working was of a nature to endanger its safety; and the suit was instituted to restrain him from proceeding. It was held, that the canal proprietors were entitled to adjacent support beyond the ten yards' limit. But it was also held, that the provisions of the Act as to compensation extended by implication to workings beyond the limit; and that the canal proprietors were not, therefore, entitled to stop the working without compensating the defendant in the same manner as if the quarry had been within the limit.

[1] *Ante*, p. 327.

[2] Following Birmingham Canal Co. *v.* Swindell. 7 H. & N. 980 n.

[3] 4 Eq. 19.

[4] See, as to these words, *ante*, p. 13.

The principle of the decision in *Dudley Canal Co.* v. *Grazebrook* has been acted on in the cases decided under ss. 77, 78, and 79 of the Rail. Cl. Cons. Act, 1845.[1] The first of these cases was *Fletcher* v. *G. W. R. C.*[2] There, the company by agreement with the owner purchased land for the purpose of making a railway. They took a conveyance in the form given by the L. C. Cons. Act, 1845, sched. A. The owner, pursuant to s. 78 of the R. C. Cons. Act of 1845, gave the company notice of his intention to work his mines within the forty yards' limit. The company gave the owner notice that the working of the mines was likely to damage their works; but they refused to pay the owner a compensation, which had been assessed under s. 78. It was proved, that, if the mines were worked, the surface, even in its natural state and without the railway, would subside.[3] It was (notwithstanding the last-mentioned fact) held, that the provisions of the Act were sufficient to exclude the implication of a grant of the right of adjacent or subjacent support; that the owner of the minerals was entitled to get them, notwithstanding that the company's works might thereby be injured; and that, therefore, under the circumstances of the case, he was entitled to recover the compensation which had been assessed. This case was approved and followed by the House of Lords in *G. W. R. C.* v. *Bennett*;[4] where, under precisely similar circumstances, a similar decision was arrived at.[5]

Rail. Cl. Cons. Act.

Fletcher v. G. W. R. C.

G. W. R. C. v. Bennett

So also in *L. & N. W. R. C.* v. *Ackroyd*.[6] There, a landowner, by a deed executed in December, 1847, granted to a railway company, who purchased under compulsory powers, and through whom the plaintiffs derived title, the right to make and maintain a tunnel. It was contended, that this was a grant of a mere easement, and that it could not have the same effect as a grant of the land actually occupied by the tunnel would have had. The court, however, held, that the

Compulsory purchase of easements.

[1] 8 & 9 Vict. c. 20. The sects. are cited *ante* pp. 5. *et seq.* (*n*).

[2] 4 H. & N. 242: affirmed nom. G. W. R. Co. *v.* Fletcher, 5 *ib.* 689.

[3] See 4 H. & N. 247. See, as to this point, *ante* p. 301.

[4] L. R. 2 H. L. 27.

[5] See also Dunn *v.* Birmingham Canal Co. L. R. 7 Q. B. 266; Mid. R. Co. *v.* Haunchwood &c. Co. 20 Ch. D. 561; Pountney *v.* Clayton, 31 W. R., 504. 605, 666. Cf. Cromford Canal Co. *v.* Cutts, 5 R. C. 442.

[6] 31 L. J. Ch. 588.

landowner's right to work minerals under ss. 77, 78, and 79 of the R. C. Cons. Act, 1845, was the same as if the land actually occupied by the tunnel had been purchased; and a bill filed to require the landowner to leave sufficient adjacent and subjacent support for the tunnel was accordingly dismissed.[1]

Effect of severance before compulsory purchase.

And the Rail. Cl. Cons. Act, 1845, does not exclusively apply, where the owner of the surface is also the owner of the mines at the time of the compulsory purchase. It equally applies, where there has been a previous severance of the surface and the mines. And in the latter case it is immaterial, that the mine owner could not have withdrawn the support as against the vendor to the company. Thus, in *Pountney* v. *Clayton*,[2] the owner of land demised the subjacent mines to the defendant. A railway company afterwards compulsorily acquired the land excepted from the demise. They subsequently sold as "superfluous" part of the land so acquired; and that part became vested in the plaintiff. The defendant withdrew support from the surface. It was held, that the company could not give to their purchaser any greater right than they themselves possessed; and that the plaintiff was, therefore, without a remedy. On the other hand, where a landowner conveys the surface in the first instance by an ordinary private assurance; and the grantee then sells such surface to a railway company, who purchase under compulsory powers; the company do not, apparently, possess a right equal to that possessed by their immediate vendor. In such a case the mine owner is, apparently, entitled to get his minerals, notwithstanding that the works of the company may thereby be injured.[3] And it is no objection to these conclusions, that they may give the mine owner an advantage for which he has not stipulated, and has not paid. If they in fact give it to him, it is because the Legislature has thought proper that he should have it. It seems, however, doubtful, whether, of necessity, they give him such an advantage. It may perhaps be, that in any compensation, which

[1] Cf. the Sc. case of Cal. R. Co. *v.* Henderson, 4 Sess. Cas. (4th ser.) 140.

[2] 31 W. R., 664.

[3] See Pountney *v.* Clayton, 31 W.R., 688, *per* Bowen, L. J.; disapproving of the dictum to the contrary of Cockburn, C. J., in G. W. R. C. *v.* Fletcher, 5 H. & N., 697, 698.

he obtains as the price of preventing him from working, the vendor to the company is entitled to share.[1]

In *R.* v. *Leeds, &c., Rail. Co.*,[2] and *R.* v. *Aire, &c., Nav. Co.*,[3] the principle of the cases decided under the Rail. Cl. Cons. Act was held inapplicable. In both these cases the Acts of Parliament, under which the companies were constituted, authorized compulsory purchases of land, reserving the mines to the landowners; and compulsory purchases took place accordingly. However, in the latter case, the Act did not contain any clauses giving the company the right of purchasing the mines,[4] or any clauses for compensating the mine-owner. And in both cases, it was, at the time of the purchase, known, that there were mines under the land purchased; and the purchase-money was agreed to and paid with that knowledge. It was in both cases held, that the right of support was purchased and paid for in the first instance.[5]

R. v. Leeds &c. R. C. R. v. Aire &c. Nav. C.

(δ) *Provisions securing Compensation to Surface Owner for Damage.*

In *Harris* v. *Ryding*,[6] A., being seised in fee of land, granted it to P. in fee; excepting the mines and minerals, with free liberty to come into and upon the premises to dig them, and every part thereof; "making a fair compensation for the damage to be done to the surface of the premises and the pasture and crops growing thereon." It was held that A. was not entitled to take all the mines, but only so much as he could, leaving a reasonable support for the surface; and that, on the sinking of the surface by reason of his working, he was liable.[7] The com-

Harris v. Ryding.

[1] See Pountney *v.* Clayton, 31 W. R. 688, *per* Bowen, L. J. The Wat. Cl. Act, 10 & 11 Vict. c. 17, contains provisions with respect to mines lying under or near lands purchased by Wat. Companies, which are substantially the same, and would no doubt receive the same construction, as ss. 77, 78 and 79 of the Rail. Cl. Cons. Act. 1845: see ss. 18, 22 and 23 of the Wat. Cl. Act.

[2] 3 A. & E. 683.

[3] 30 L. J. Q. B. 337.

[4] Cf. N. E. R. Co. *v.* Crossland, 2 J. & H. 565; 4 De G. F. & J. 550.

[5] Cf. Cal. R. Co. *v.* Sprot. 2 Macq. 455.

[6] 5 M. & W. 60.

[7] There were houses on the land at the time of the subsidence. The defendants did not, however, state, that, in removing their coal, they left sufficient support for the surface in its natural state: they claimed an abso-

pensation clause was relied on in argument for the purpose of showing, that the parties themselves, having fixed upon a particular remedy for the damage resulting from the workings, must, by implication, be held to have excluded the ordinary remedy. But this contention failed. The Court considered that the compensation clause applied, or might be deemed to apply, to damage resulting from acts done on the surface under the reserved liberty; and that, even if this were not so, and the clause applied to injuries from operations below, it merely made the remedy cumulative.[1] In *Smart* v. *Morton*,[2] a similar construction was adopted; although compensation was there provided for damage "by reason of digging, working, sinking, breaking of ground, and wayleave or other matter or thing used or exercised in working or leading of coals." And a similar construction was approved of in *Davis* v. *Treharne*;[3] although it was there assumed,[4] that the lessee was at liberty to do and execute all necessary or convenient acts, works, and things, upon, in, "or under," or above the premises, making compensation for all damage occasioned by the exercise of the liberties. There was less difficulty in *Bell* v. *Love*,[5] a case under an Inclosure Act. There, however, the Act only provided for making satisfaction "for the damages and spoil of the ground" occasioned to the persons at the time in possession, such satisfaction not to exceed £5 yearly "during the time" of such working, for every acre damaged or spoiled. It was in this case evident, that the compensation clause pointed to temporary and not permanent damage; the occupier being alone entitled to receive the compensation, and a period being limited for the duration of its payment.[6]

Smart *v.* Morton.

Davis *v.* Treharne.

Bell *v.* Love.

lute right to remove the support. See, as to this, the judgment of Parke, B. p. 71; and see *ante*, p. 301.

[1] See also Berkeley *v.* Shafto, 15 C. B. N. S. 79, 92; Williams *v.* Bagnall, 15 W. R. 274, 275; Smith *v.* Darby, L. R. 7 Q. B. 726; Chapman *v.* Day, 47 L. T. 707, 708. Cf. N. E. R. Co. *v.* Crossland, 2 J. & H. 578.

[2] 5 E. & B. 30.

[3] 6 App. Cas. 460.

[4] Merely *argumenti causâ*. The reserved liberties in the lease of the surface were more extensive than the granted liberties in the previous lease of the mines, and the former liberties could not of course confer any rights upon the mineral lessee which he had not under the latter. Cf. on this point, Eadon *v.* Jeffcock, L. R. 7 Exch. *ante*, p. 305.

[5] 10 Q. B. D. 547.

[6] See also Roberts *v.* Haines, 6 E. & B. 643; Haines *v.* Roberts, 7 *ib.* 625,

A different construction was adopted in *Smith* v. *Darby*.[1] There a person, through whom the plaintiff claimed, and who was seised in fee of certain lands and of the underlying mines, demised the mines, with full power to the lessees to work the same; making reasonable compensation to the lessors and their tenants for damage done by the surface being covered with rubbish, or for damage done to the lands in sinking and getting the minerals, "or for injury done in dwelling-houses" on the lands "by getting minerals, &c., under or near the same," according to the covenant thereinafter contained. Then followed a covenant, providing, that, in case damage should be caused to the dwelling-houses by the mining operations, the lessees should rebuild or repair them; and that they should compensate the lessor and his tenants for damage done to the crops and land. It was held, that these provisions were sufficient to exclude the right of support. It should be observed, that, in this case,[2] the compensation clause could not, as in *Harris* v. *Ryding*,[3] be read as confined to acts done on the surface; and that the remedy could not, therefore, be considered cumulative. It was evident, that injury was contemplated to the dwelling-houses; and this could only proceed from mining operations below.[4] So in *Aspden* v. *Seddon*.[5] There a piece of land was conveyed; excepting the underlying mines, with liberty to search for and carry away the minerals, "but without entering on the surface;" the grantor making compensation for all damage done by the exercise of the excepted liberties to the erections to be made on the piece of land. The consideration for the conveyance partly consisted of certain covenants by the

Smith *v.* Darby.

Aspden *v.* Seddon.

(but see p. 627. *per* Martin B.); Richards *v.* Jenkins, 17 W. R. 30. Cf. Hodgson *v.* Moulson, 18 C. B. N. S. 332. Cf. also Proud *v.* Bates, 34 L. J. Ch. 412. The construction placed upon "surface damage" in Harris *v.* Ryding and Smart *v.* Morton was adopted in Allaway *v.* Wagstaff, 4 H. & N. 681. There surface damage was defined to mean "damage to the crops by using the surface, or by the smoke coming from the colliery works or pit heaps in respect of which compensation is payable under leases or reservations of coal, or where lords work coal by custom under copyhold lands;" see p. 688, *per* Watson, B. Cf. the Scotch cases of Bain *v.* Hamilton, 6 Sess. Cas. (ser. 3) 1; Galbraith *v.* Eglington Co., 7 Sess. Cass. (ser. 3), 167.

[1] L. R. 7 Q. B. 716.

[2] See the judgment of Lush, J. at p. 727.

[3] 5 M. & W. 60, *ante* p. 331.

[4] Cf. Williams *v.* Bagnall, 15 W. R. 275, *infra*, 336.

[5] 10 Ch. 394.

grantee, including a covenant to erect and keep in repair a cotton-mill on the piece of land. The grantee erected the cotton-mill. The mine owner worked by means of a pit outside the boundary of the surface owner; and, in consequence of the working, the land subsided, and the mill was injured. It was held, that, notwithstanding the covenant to erect the mill,[1] the mine owner could not be restrained from working, so as to let down the surface. It was in this case evident, that, as the mine owner was precluded from entering upon the surface, the compensation which he was to pay could only refer to underground workings.[2]

Buccleuch *v.* Wakefield.

Buccleuch v. *Wakefield*[3] was a case of greater difficulty. There an Inclosure Act, after directing certain allotments to be sold to defray the expenses of the Act, reserved to the lord of the manor all mines under the lands directed to be divided and inclosed. Then followed certain specially enumerated powers of a very elaborate kind; amongst which was a power to destroy the surface for an indefinite period by the deposit of refuse, the erection of buildings, and the formation of channels. These powers were to be exercised in as full and ample a manner as if the Act had not been passed; the lord making reasonable compensation for damage done by his mining operations to the persons sustaining such damage. The mines were very valuable; and previously to the Act the lord had frequently worked them, paying compensation for the damage which he did. And, regard being had to the fact of the soil having previously been commonable, the reserved powers were far more extensive than any which the lord would have had if the Act had not passed. Mr. Wakefield was the purchaser of some of the land which had been sold to defray the expenses of the Act. The Duke of Buccleuch was the lord of the manor. It was held, that the intention of the legislature was, that the completest power should be given of working the mines; and, therefore,

[1] Cf., upon this point, Buchanan *v.* Andrew, L. R. 2 Sc. & D. 286, *infra*, p. 336.

[2] Cf. Davis *v.* Treharne, 6 App. Cas. 468; Dixon *v.* Wood, W. N. 1882, p. 176. The bill in Aspden *v.* Seddon was dismissed, without prejudice to the right to bring an action at law for damages. An action was accordingly brought, which resulted in favour of the surface owner: see Aspden *v.* Seddon, 1 Exch. D. 496.

[3] L. R. 4. H. L. 377.

that the lord was entitled to work to an extent, which might reach to the utter destruction of the land above, subject only to the liability to pay compensation for damage done.[1]

(ε) *Provisions relieving Mine Owner from Liability for Damage.*

In *Rowbotham* v. *Wilson*,[2] certain land was enclosed by an award made in 1770 under an Inclosure Act; and the surface was allotted to a person through whom the plaintiff claimed, and the mines to a person through whom the defendant claimed. By a clause in the award all the allottees of the surface, parties to the award, covenanted that the allottees of the mines, parties to the award, their heirs and assigns, should be at liberty to work the mines, and should not be liable to any action for any sinking of the surface. The plaintiff's predecessor executed the award as a deed. The defendant's predecessor did not execute it, but accepted the allotment under it. Houses were afterwards built upon the land; and, after they had stood undisturbed for more than twenty years, the mineral operations of the defendant caused the surface to sink, and the houses were injured. It was contended, that the covenant, not being a covenant running with the land, could not bind the plaintiff. It was, however, held, that the covenant, although nominally such, was in effect a grant of a right to disturb the surface; and that the plaintiff was not, therefore, entitled to maintain an action.[3] *Richards* v. *Harper*[4] was a case of a different kind. There the owner of freehold and copyhold land adjacent to each other sold the copyhold land; and by a deed of even date the purchaser covenanted and granted, that the vendor and his heirs might work the mines in the adjoining freehold without being liable to make compensation for any injury caused by such working to the copyhold, or to certain

Rowbotham v. Wilson.

Richards v. Harper.

[1] Reversing Wakefield *v.* Buccleuch, 4 Eq. 613. See the observations, upon this decision, of Mellish, L.J., in Hext *v.* Gill, 7 Ch. 716, 717.

[2] 8 H. L. C. 348, affirming S. C. 8 E. & B. 123, which affirmed S. C. 6 *ib.* 593.

[3] See 8 H. L. C. 362, *per* Lord Wensleydale. See Bell *v.* Love, 10 Q. B. D. 562. It was contended in Rowbotham *v.* Wilson, that a support had at all events been acquired for the houses by the twenty years' enjoyment. See, as to this, *ante* p. 317.

[4] L. R. 1 Exch. 199.

buildings authorised to be erected thereon. The deed was not entered on the Court Rolls, nor referred to in the surrender. The copyhold was afterwards enfranchised; and it was conveyed by the purchaser to the Church Building Commissioners, under whom the plaintiff took. Neither the lord of the manor, nor the commissioners, nor the plaintiff, had notice of the deed. The defendant, who took the adjoining freehold land under the original vendor, worked the mines thereunder; and, in so doing, he caused the land of the plaintiff to sink, and damaged the buildings thereon. It was held, that the covenant did not run with the land, and that the defendant was bound to compensate the plaintiff for the injury.[1]

Williams *v.* Bagnall.

In *Williams* v. *Bagnall*,[2] lands were conveyed to the predecessors of the plaintiffs in fee. The conveyances excepted all mines, with full power to work and get, without entering upon the land and premises; and without being answerable for any injury whatsoever, which should arise to the said land and premises, or to any buildings which should at any time afterwards be erected thereon by reason of the working and getting, &c.; and without being liable to any action or suit at law or in equity, costs, charges, losses, damages, or expenses, for, or on account of, any such injury or damage. A lessee from the vendor of all the excepted mines worked them; and he thereby caused the surface of the plaintiff's land to sink, and injured buildings which had been erected thereon subsequently to the conveyance. It was contended, that the provision relieving the vendor from liability applied, or might be taken to apply, as in the case of the compensation clause in *Harris* v. *Ryding*,[3] to damage other than that resulting from the removal of the support. It was, however, held, that the *primâ facie* right of the surface owner was completely swept away by the express terms of the contract.[4] So in *Buchanan* v.

Buchanan *v.* Andrew.

[1] Pollock, C. B. rested his decision on the fact, that the land in question had been originally copyhold: but the majority of the Court (Martin, Channell and Pigott, BB.) were of opinion, that the result would have been the same if the land had been freehold. Cf. Rowbotham *v.* Wilson, 8 H. L. Cas. 362.

[2] 15 W. R. 272.

[3] 5 M. & W. 60; *ante*, p. 331.

[4] The right of lateral support was claimed in additon to that of vertical support, but without success: see, upon this point, *ante*, pp. 300, 301.

Andrew.[1] There a feu of lands was granted, excepting the subjacent mines, with full working powers. The feuar contracted to build a house upon the land, according to an elaborately defined plan; and to maintain it in repair. But the feu contained a provision, that the superior should not be liable for any damage which might arise to the surface feued, or the house which might be erected thereon, by or through the working of the minerals by long-wall workings[2] or otherwise, or which might arise from or through the setting or crushing of any coal-waste. The house was afterwards built; and it was damaged by the working of the minerals. It was held, notwithstanding the nature of the contract as to building the house and keeping it in repair, that the feuar was without a remedy in damages.[3] And it was held, that, as his right to an injunction depended on his right to damages, he was equally without a remedy by injunction.[4]

In *Benfieldside Local Board* v. *Consett Co.*,[5] a different construction was adopted. There commissioners, acting under powers given to them by a local Inclosure Act for inclosing certain commons, set out public highways over the land, and directed that it should be lawful for all persons to use them. The Act reserved to the lord of the manor, his successors and assigns, in the widest terms, all rights belonging to the manor, and all mines, minerals, and quarries, under the commons; with power to do every act necessary for working and winning them as effectually as he or they could have done in case the Act had not been made, without paying any damages or making any satisfaction. The defendants, who were the assignees of the lord, worked so that parts of one of the roads set out by the commissioners subsided. It was held, that it could not have been intended, that an Act, which appointed a public road, should at the same time legalise a public nuisance by injuring the road; and that the defendants were therefore liable.[6] Benfieldside Loc. Bd. v. Consett Co.

[1] L. R. 2 Sc. & D. 286.

[2] A method under which the whole of the minerals were removed without leaving any support whatever.

[3] Cf. Aspden v. Seddon, 10 Ch. 394, *ante* p. 333. And distinguish the Sc. case of White v. Dixon, 9 Sess. Cas. (4th ser.) 375: affirmed nom. Dixon v. White, W. N. 1883, p. 52.

[4] See 2 Sc. & D. 291, 292, 296. See Bell v. Love, 10 Q. B. D. 562 563.

[5] 3 Exch. D. 54.

[6] See also Normanton Gas Co. v.

(ζ) *Remarks on and Result of the Cases.*

Remarks on the cases.

Of the cases referred to in division (γ) of the present subject, *Cal. R. C.* v. *Sprot*, *Elliot* v. *N. E. R. C.*, and *N. E. R. C.* v. *Crossland*, may be reconciled with *Dudley Canal Co.* v. *Grazebrook*, and the decisions under sects. 77, 78, and 79 of the Rail. Cl. Cons. Act, 1845, on the following grounds:—The provisions of those sections (in conjunction with the Lands Cl. Cons. Act, 1845,[1]) were intended to create a special code[2] by which alone the relations of railway proprietors to adjoining landowners were to be governed. The companies were not, in the first instance, in purchasing the surface, to be obliged to make compensation in respect of the mines thereunder. If they thought it likely, that the mines might not be worked for an indefinite period, they might postpone making such compensation, until the necessity for so doing arose.[3] Accordingly, in the cases decided under those sections, and in cases like *Dudley Canal Co.* v. *Grazebrook*, which, although not decided under those sections, were decided under Acts of Parliament, the policy of which was very similar,[4] the Courts had little difficulty in holding, that the implication of the grant of the rights of adjacent and subjacent support was excluded.[5] In *Cal. R. C.* v. *Sprot*, *Elliot* v. *N. E. R. C.*, and *N. E. R. C.* v. *Crossland*, on the other hand, the Acts of Parliament by which the companies had been incorporated, and the deeds by which they had purchased their lands, were all of prior date to the passing of the Rail Cl. Cons. Act, 1845. And, although, as will have been observed,[6] the injuries com-

Pope, 48 L. T. 666, 669: affirmed 52 L. J. Q. B. 629.

[1] See *infra*, Part D. (β).

[2] The sections of the Rail. Cl. Act are prefaced by the words, "And with respect to mines lying under or near the railway be it enacted as follows." See G. W. R. Co. *v.* Bennett, L. R. 2 H. L. 40, *per* Lord Cranworth; Pountney *v.* Clayton, 31 W. R. 665, 667, *per* Brett, M. R., and Bowen, L. J. The sections are cited *ante* pp. 5 n. *et seq.*

[3] See *ante*, p. 8 n. [1], and cases there cited. See also Pountney *v.* Clayton, *u. s.*

[4] See the observations of Bayley, J., in Dudley Canal Co. *v.* Grazebrook, 1 B. & Ad. 72; and Cockburn, C. J. and Hannen, J. in Dunn *v.* Birmingham Canal Co., L. R. 7 Q. B. 256, 276, 277, 279. See also Wyrley Canal Co. *v.* Bradley, 7 East, 372.

[5] See Mid. R. Co. *v.* Haunchwood &c. Co. 20. Ch. D. 558.

[6] See *ante*, pp. 323, 324, 325, 326.

plained of, or sought to be restrained, in the three latter cases were done, or threatened to be done, at times subsequent to the passing of the Rail Cl. Cons. Act, 1845, or of enactments of a similar policy,[1] the Courts could not hold, that subsequent legislation was intended to control rights previously acquired by the companies.[2] The policy of the Rail. Cl. Cons. Act being therefore inapplicable to cases like *Cal. R. C.* v. *Sprot*, *Elliot* v. *N. E. R. C.*, and *N. E. R. C.* v. *Crossland*, there was no reason why the principle, that where a grant is made for a particular object known to both parties at the time of the grant, a reasonable degree of support for the due execution of that object is impliedly granted,[3] should not in those cases be adopted.[4] With respect, generally, to the various cases referred to in divisions (β), (γ), (δ), and (ε) of the present subject, the following observations may be made. In the earlier cases, the Courts, in construing the instruments before them, apparently adopted the curious mode, both in the case of land in its natural state, and of land in its non-natural state, of assuming, in the first instance, the existence of an intention, that the right of support should not be disturbed; and of then proceeding to consider, whether the provisions used could not be reconciled with that intention. In the later cases, on the other hand, the Courts seem to have assumed nothing; but to have proceeded at once to construe the instruments before them according to their literal and natural meaning. It is, in many respects, difficult to reconcile the earlier with the later cases; and, on these grounds, the difficulty seems capable of explanation.[5] It need hardly be added, that the later cases must, at the present day, be considered authoritative.

Result of the cases.

Having regard to these circumstances, the following propositions may, as the result of the cases, in which the instrument of severance is producible, and in which some contract has been made, or is said to have been made, with respect to support, be considered as established :—

[1] Such as the Scotch Railways Act of 1845 in Cal. R. Co. *v.* Sprot.

[2] See Cal. R. Co. *v.* Sprot, 2 Macq. 458; G. W. R. Co. *v.* Bennett, L. R. 2 H. L. 32, 40.

[3] *Ante*, p. 311.

[4] See Aspden *v.* Seddon, 10 Ch. 404, *per* Mellish, L. J.

[5] See Aspden *v.* Seddon, 10 Ch. 397 (*n*).

1. Instruments of severance are at the present day construed according to their literal and natural meaning, rather than according to preconceived assumptions of the existence of an intention in the parties, or in the Legislature, that the right of support should not be disturbed.

2. Where it appears, from the express words of such instruments, or by clear intendment therefrom, that it was the intention to exclude the right, effect will be given to such intention.

3. Where the mine owner is relieved from liability for damage, the surface owner may often be presumed to have been compensated by anticipation. But in other cases the presence of a clause for compensating the surface owner ;[1] at all events if it refers to underground working ; are material elements in ascertaining an intention to exclude the right.

4. In cases decided under ss. 77, 78, and 79 of the Rail. Cl. Cons. Act, 1845, or under similar provisions, such an intention will usually be presumed. And in such cases it is immaterial, that the surface would have subsided, even if it had been left in its natural state.[2]

5. In such cases it is also immaterial, whether the owner of the surface is or is not the owner of the mines at the time of the compulsory purchase.[3]

6. But it will be otherwise, where, from the provisions in question, the right appears to have been purchased and paid for in the first instance.[4]

7. The common covenants to work in the usual and most approved mode; or the common clause in an Inclosure Act, under which mines are reserved to the lord, of holding and enjoying them in as full, ample and beneficial a manner as if the Act had not been made ; or the common clauses giving full liberties of working and winning; are not, of themselves, sufficient to exclude the right.[5]

8. The right will not be excluded if a public nuisance would be thereby legalized.[6]

[1] See Aspden *v.* Seddon, 10 Ch. 396, 397 (*n*) ; Gill *v.* Dickinson, 5 Q. B. D. 162 ; Bell *v.* Love, 10 Q. B. D. 569.

[2] See Fletcher *v.* G. W. R. Co.; and G. W. R. Co. *v.* Bennett ; cited *ante*, p. 329. See also Pountney *v.* Clayton, 31 W. R. 664.

[3] See *ante*, p. 330.

[4] See *ante*, p. 331.

[5] See *ante*, pp. 319, 320.

[6] See *ante*, p. 337.

9. The right may not be excluded by a provision relieving the mine owner from liability, if such provision be constituted, not by a grant, but by a covenant not running with the land.[1]

10. Where the right has not been expressly excluded, or where the intention to exclude it is doubtful, the principle formerly[2] mentioned—that the owner of land in its natural state is entitled, *primâ facie*, to support, lateral as well as vertical; and that in whichever way the severance is effected, whether by a grant of the land, excepting the mines, or by a grant of the land (whether in fee simple, or for a term of years,) excepting the surface;—is applicable in favour of the contention, that the right has been granted or reserved by implication.[3]

11. Where, under like circumstances, land is in its non-natural state, the principle formerly mentioned[4]—that where land is purchased, or excepted from a purchase, for a particular object, and such object is known to both parties at the time of the purchase, there is, *primâ facie*, an implied grant or reservation of a reasonable degree of support for the due execution of that object—is applicable in favour of the like contention.

PART D.—STATUTORY PROVISIONS AS TO SUPPORT.

(α) *Generally.*

Many statutory provisions as to support under Inclosure Acts;[5] under Railway Acts;[6] and under Canal Acts;[7] have been already noticed. Generally.

(β) *Purchases—ss.* 16, *&c., Lands Clauses Act—s.* 77 *Rail. Cl. Act—ss.* 12, 18 *Wat. Cl. Act.*

A railway company or a waterworks company, having the usual power to purchase lands, have power under ss. 16, *et seq.* Purchases—Rail. or Wat. Co.

[1] See *ante*, pp. 335, 336.
[2] *Ante*, p. 297.
[3] See Aspden *v.* Seddon, 10 Ch. 396 (*n*), 399 (*n*).
[4] See *ante*, p. 311.
[5] *Ante*, pp. 321, 332, 334, 335, 337.
[6] *Ante*, pp. 323—326, 329—331.
[7] *Ante*, pp. 326, 327, 328.

of the Lds. Cl. Act, 1845, and s. 77 of the Rail. Cl. Cons. Act, 1845, or ss. 12 and 18 of the Wat. Cl. Act, to purchase mines and minerals; and may do so separately from the rest of the land from the surface down to the centre; by compulsion; and notwithstanding that they may have already purchased the surface as a separate tenement.[1] And the power, which they also possess, of preventing the working of a mine upon the terms of compensating the owner, does not restrict their power of purchase.[2] It may, no doubt, be more convenient for them, as the Legislature enables them,[3] to postpone making compensation in respect of the mines until the necessity arises.[4] But it may on the other hand be both more convenient and more economical for them to purchase the mines at once.[5] Indeed it may be necessary for them to take the latter course, if they desire to be protected against injury from subsidence. For they may have no means of obtaining adequate support for their works without removing the minerals, and substituting artificial props.[6] Their power of purchase is, however, only exercisable in respect of mines and minerals lying under lands within the prescribed territorial limits; and is only exercisable within the prescribed time.[7]

(γ) *Compensation for not working—ss.* 6, 78, 79 *Rail. Cl. Act—ss.* 6, 22, 23 *Wat. Cl. Act—s.* 308 *Pub. Health Act,* 1875.

Generally.

The questions, which have arisen respecting support under ss. 78 & 79 of the Rail. Cl. Cons. Act, 1845, and under ss. 22 & 23 of the Wat. Cl. Act, have been already partly considered.[8]

Compensation for not working.

The power of preventing the working of a mine upon the

[1] Errington *v.* Met. R. Co., 19 Ch. D. 559; *ante*, pp. 141, 142. They are not in the position of purchasers, who buy under the Lds. Cl. Act, but cannot avail themselves of the Rail. Cl. Act or the Wat. Cl. Act. The latter purchasers have no power to elect to buy the surface only. If they buy at all, they must buy the whole of the land, including the mines. See Pountney *v.* Clayton, 31 W. R. 664, *per* Brett, M. R. See *ante*, p. 143.

[2] Errington *v.* Met. R. Co., *u. s.*, 559, 569, 570, 571, 575, 576.

[3] *Ante*, p. 338.

[4] Errington *v.* Met. R. Co., *u. s.*, 570, 571.

[5] *Ante*, p. 143.

[6] Errington *v.* Met. R. Co., *u. s.*, 575.

[7] *Ib.* 570, 575.

[8] *Ante*, pp. 329, 330, 331.

terms of compensating the owner is in some respects wider and in others narrower than the power of purchasing a mine. The former power is not confined to mines lying under lands within the prescribed territorial limits; nor is it only exercisable within the prescribed time. It applies to mines under lands outside the limits; and it is exercisable at all times.[1] On the other hand the company do not by paying the compensation acquire the property in the mines and minerals in respect of which they pay it. Those mines and minerals continue the property of the landowner; and, although he cannot remove them, neither can the company.[2]

Person entitled to give statutory notice.

The "owner, lessee, or occupier," entitled to give the notice mentioned in s. 78 of the Rail. Cl. Cons. Act, 1845, and in s. 22 of the Wat. Cl. Act,[3] means the person, who has the right to presently work the mine in question. And the compensation to be made under those sections, as the price of stopping an intended working, means the compensation to which such person is individually entitled according to his interest. If he may remove the whole produce of the mine, and the extent of his tenure will enable him to do so, the compensation may mean the entire value of the minerals. If his right is not so great; if he cannot take away the whole, or his tenure will not enable him to do so; or if he cannot appropriate to his own benefit the whole of the produce; the compensation means that part of the entire value which is proportionate to his interest. And the mere fact, that, in cases of the latter kind, it may often be a matter of extreme difficulty to assess the compensation, seems immaterial.[4] A licensee, if entitled to appropriate the minerals which he gets,[5] is an occupier within the statutory words.[6]

Consequent position of reversioner.

On the other hand, the reversioner on a lease cannot obtain compensation under those sections, although he may show a right of his own to be compensated beyond that of the lessee. But he is not, therefore, without a remedy. In such a case ss. 6

[1] Errington *v.* Met. R. Co., 19 Ch. D. 570, 575.

[2] *Ib.* 575.

[3] See *ante*, pp. 6 n., 9.

[4] See Smith *v.* G. W. R. Co., 3 App. Cas. 178, 179, 180, 185, 188, 191. As to the difficulty which may sometimes be met in assessing the compensation, see the instance put by Mellish, L. J. (G. W. R. Co. *v.* Smith, 2 Ch. D. 252) of a woman entitled during widowhood.

[5] See *ante*, p. 249.

[6] See Mid. R. Co. *v.* Haunchwood, &c., Co., 20 Ch. D. 552, 561.

and 78 of the Rail. Cl. Cons. Act, 1845, or ss. 6 and 22 of the Wat. Cl. Act, must be read together; and the reversioner may avail himself of s. 6 of the Act in question; the word "lands" in that section including mines.[1] Thus in *Smith* v. *G. W. R. Co.*[2] There the company purchased land under the Rail. Cl. Cons. Act, 1845, but did not purchase the subjacent coal. The company constructed a part of their railway on the land so purchased. The landowner subsequently granted a lease of the coal. The lease was at an acreage rent; and the lessee covenanted to work out all the coal during his term. The lessee gave the company notice of his intention to work within the forty yards' limit.[3] The company thereupon compensated the lessee, and the coal was left unworked. The lessee afterwards surrendered the lease to the landowner; and the latter sold the mine to the defendant. Shortly before the expiration of the term for which the lease had been granted, the defendant gave the company notice of his intention to work; and he claimed compensation without regard to the payment previously made to the lessee. The company filed their bill, offering compensation, having regard to their previous payment; and asking for an injunction to restrain the defendant from working. It was contended on the part of the defendant, that the company had compensated the lessee and him alone; and accordingly, until the defendant was compen-

[1] Cf. *ante*, p. 20. Sect. 6 of the Rail. Cl. Cons. Act, 1845, is as follows:—"In exercising the power given to the Company by the special Act to construct the railway and to take lands for that purpose the Company shall be subject to the provisions and restrictions contained in this Act and in the said Lands Clauses Consolidation Act; and the Company shall make to the owners and occupiers of and all other parties interested in any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners occupiers and other parties by reason of the exercise as regards such lands of the powers by this or the special Act or any Act incorporated therewith vested in the Company; and except where otherwise provided by this or the special Act the amount of such compensation shall be ascertained and determined in the manner provided by the said Lands Clauses Consolidation Act for determining questions of compensation with regard to lands purchased or taken under the provisions thereof; and all the provisions of the said last-mentioned Act shall be applicable to determining the amount of any such compensation and to enforcing the payment or other satisfaction thereof." S. 6 of the Wat. Cl. Act is to the same effect.

[2] 3 App. Cas. 165.

[3] See s. 78, cited *ante* p. 6 n.

sated as the then absolute owner, he was entitled to work. It was contended, on the other side, that the Legislature could never have intended, that the company should be obliged to pay more than once for the same coal; that, if the defendant was thereby prejudiced in respect of royalties to which he might have been entitled under the lease, the Legislature had provided a special method of compensating him under s. 6; and that that compensation they had offered to give him by their bill. The latter contention was upheld by the Court, and an injunction was granted.[1]

These principles not always applicable.

However, even in the case of a company subject to the Rail. Cl. Cons. Act, 1845, or the Wat. Cl. Act, if a notice has been given and compensation received in respect of one kind of mineral, such as coal, the owner is not precluded from subsequently giving a notice and receiving compensation in respect of another kind of mineral, such as ironstone intermixed with the coal.[2] And in the case of a company not so subject, both a reversioner and his lessee may be entitled to receive compensation in respect of the same minerals.[3]

Length of notice—counter notice.

A mine owner is obliged to give thirty days' notice to a railway or waterworks company of his intention to work out the minerals in question.[4] However, the company are not bound to any fixed period after that notice within which they must give a counter-notice.[5] If at any time thereafter they fear danger to the line, they can stop the working, or (if it has been already commenced) the prosecution of the working, by a notice of their willingness to pay compensation for the minerals which are unwrought, and which they desire to be left standing. No doubt

[1] See the form of the decree pp. 183, 192, 193. It affirmed G. W. R. Co. *v.* Smith, 2 Ch. D. 235.

[2] See Smith *v.* G. W. R. Co., 3 App. Cas. 182, *per* Lord Cairns.

[3] See Barnsley Canal Co. *v.* Twibell, 7 Beav. 19. Where the owner of a surface is not the owner of the mines at the date of a compulsory purchase by a company; and the mine owner could not have withdrawn support as against the vendor to the company; it may be, that the vendor to the company is entitled to share in the compensation which may be awarded to the mine owner. See *ante* pp. 330, 331.

[4] See R. C. Cons. Act, 1845, s. 78, cited *ante*, p. 6, n.; Wat. Cl. Act, s. 22. The notice should in all cases be sufficient in point of form: see Dixon *v.* Cal., &c., Companies, 5 App. Cas. 823, 834.

[5] See R. C. Cons. Act, s. 79, cited *ante*, p. 6 n.; Wat. Cl. Act, s. 23.

Smith v. *G. W. R. Co.*, a case in the House of Lords,[1] contains a dictum to the contrary.[2] But the dictum was overruled in a subsequent case before the same tribunal.[3]

Working after notice—withdrawal of notice.

A mine owner, who has given the statutory notice, does not lose his right to compensation by merely afterwards proceeding to work the minerals in question. Such a working can only entitle the company to damages or an injunction in independent proceedings; or to a reduction in the amount of the compensation.[4] On the other hand, a notice once given cannot be withdrawn; unless perhaps with the consent of the company.[5]

Improper notices.

In general, as has been already seen,[6] where a company purchase land under the provisions of the Rail. Cl. Cons. Act, or under Acts of a similar policy, they are not in the first instance, in purchasing the surface, obliged to compensate the landowner for mines which he has not begun to work. But this rule does not apply, where it appears, that the mines in question are about to be worked without delay. As soon as the injury complained of, although not actually sustained, has become capable of estimation, the time for receiving compensation has arrived.[7] A mine owner will not, however, it seems, be allowed to force a company into arbitration, where it appears that no injury can possibly arise from his workings.[8] And in all cases a notice of an intention on his part to work should be *bonâ fide*.[9]

Compensation under Pub. Health Act, 1875.

The compensation to which, under the Pub. Health Act, 1875, a mine owner is entitled, who is obliged to leave his minerals unworked,[10] is payable as soon as the local authority in question have constructed their works, and in respect as well of prospective as of actual injury.[11]

[1] 3 App. Cas. 165.

[2] See p. 182, *per* Lord Cairns.

[3] Dixon *v.* Caledonian, &c., Companies, 5 App. Cas. 820; a decision upon the Rail. Cl. Cons. (Scotland) Act, 1845. See Mid. R. Co. *v.* Haunchwood, &c., Co., 20 Ch. D. 561.

[4] See Swindell *v.* Birmingham Canal Co., 9 C. B. N. S. 241, 279.

[5] See *ib.*

[6] *Ante*, p. 338.

[7] See Cromford Canal Co. *v.* Cutts, 5 R. C. 442. Cf. Whitehouse *v.* Wolverhampton R. Co., L. R. 5 Exch. 6.

[8] See Cromford Canal Co. *v.* Cutts, *u. s.*

[9] See Mid. R. Co. *v.* Haunchwood, &c., Co., 20 Ch. D. 558.

[10] See *ante*, p. 312.

[11] *Re* Dudley, 8 Q. B. D. 86, 94, 96.

(δ) *Damage for Severance—s.* 81 *Rail. Cl. Act—s.* 25 *Wat. Cl. Act.*

Damage for severance.

A company purchasing land under the Rail. Cl. Cons. Act, 1845, are bound, "from time to time," to compensate a mine owner for all expenses and losses he may sustain by severance.[1] And the Waterworks Cl. Act contains provisions of a very similar kind.[2] *Whitehouse* v. *Wolverhampton R. Co.*[3] shows the principle upon which such compensation will be estimated. It was there held, that the mine owner was, notwithstanding the words "from time to time," entitled to have included in his compensation items for losses or expenses not then actually sustained, but which would necessarily be sustained or incurred in working the mines, and which were capable of being immediately estimated with reasonable certainty. A contrary construction of the Act would lay on a mine owner the obligation of actually spending the money he sought to recover before he could establish his claim; and perhaps of making claims *de die in diem*.[4]

(ε) S. 85 *Lds. Cl. Act—ss.* 78, 81 *Rail. Cl. Act—ss.* 22, 25 *Wat. Cl. Act.*

Bond under ds. Cl. Act.

The bond required to be given under s. 85 of the Lands Cl. Cons. Act, 1845, by a company desirous of entering upon lands before agreement come to, award made, or verdict given, does not include within its condition compensation for minerals under ss. 78 and 81 of the Rail. Cl. Act, 1845,[5] or under ss. 22 and 25 of the Waterworks Cl. Act;[6] but only the purchase money for the lands taken, and compensation for the execution of the works.[7]

[1] See s. 81, cited *ante*, p. 7 n.

[2] See s. 25.

[3] L. R. 5 Exch. 6. Cf. Cromford Canal Co. *v.* Cutts, *ante*, p. 346.

[4] The Court has no jurisdiction over a master's taxation, under s. 1 of 32 & 33 Vict. c. 18, of the costs of an enquiry to assess compensation in respect of purchase money and damage by severance: Sandback Trustees *v.* North Staf. R. Co., 3 Q. B. D. 1. See further, as to s. 81 Rail. Cl. Act, and s. 25 Wat. Cl. Act, *infra* (ε).

[5] See these sects. cited *ante*, pp. 6 n., 7 n.

[6] *Ante*, p. 9.

[7] *Ex parte* Neath and Brecon R. Co., 2 Ch. D. 201.

(ζ) *Mode of working—Right to inspect.*

Working must be proper and usual.

A mine owner left at liberty to work his mines must, under the express terms of the 79th sect. of the Rail. Cl. Cons. Act, work them in a manner proper and necessary for the beneficial working, and according to the usual mode of working in the district in question. And, if any damage is caused by his not doing so, he is liable to make it good.[1] But the mere facts, that the usual mode of working surface minerals is by open workings and that open workings would involve a trespass upon the property of the company in question, do not entitle the company to say that surface minerals shall not be worked by underground excavations. The company would otherwise be enabled to prevent surface minerals from being worked at all.[2]

Right to inspect.

A company purchasing land under the Rail. Cl. Cons. Act, 1845, may enter and inspect the mines, and make use of the mining machinery, for the purpose of ascertaining, whether, in their working, sufficient support is left for the railway. And, in a proper case, they may compel the mine owner to take all necessary precautions for the protection of the railway.[3] And the Wat. Cl. Act [4] contains provisions of a somewhat similar kind.[5]

PART E.—SUPPORT FROM WATER.

Express grant.

The right of support from water may be acquired by express grant.[6]

Elliot *v.* N. E. R. C.

In *Elliot* v. *N. E. R. Co.*,[7] there was, at the time of the purchase of land by a company for the purpose of erecting a railway, underneath the land purchased, and also underneath some adjoining land of the vendor, an old mine which had been drowned for more than forty years. The drowning was due to

[1] See *ante*, p. 6 n.; G. W. R. Co. *v.* Bennett, L. R. 2 H. L. 38, 39, 42.; Pountney *v.* Clayton, 31 W. R. 665, 666.

[2] See Mid. R. Co. *v.* Haunchwood, &c., Co., 20 Ch. D. 552, 560, 561, *per* Kay, J.

[3] See 8 & 9 Vict. c. 20, ss. 83, 84, 85, cited *ante*, p. 7 n.

[4] 10 & 11 Vict. c. 17.

[5] See s. 26.

[6] There is no *primâ facie* right: see *ante*, p. 291.

[7] 10 H. L. C. 333: see *ante*, p. 324.

the accidental overflowing of a neighbouring river. The water stood eighty fathoms deep in a perpendicular shaft in the mine; and from this shaft ran horizontally several passages, which were filled with water. On the surface of the purchased land the company constructed a portion of their works. Vertical support to the land so burdened was in part given by the hydrostatic pressure of the water in the shaft, and was also in part given by the water in the horizontal passages. The mine owner gave the company notice of his intention to work the mine, and for that purpose to pump out the water in the shaft and passages; and the company filed a bill to restrain him. The Court held, that the company had no right to prevent the mine owner from withdrawing the water.[1] The circumstance of the water being in the shaft and passages was purely accidental, and one which the company might have known there was every probability of the mine owner altering.

Popplewell *v.* Hodkinson.

In *Popplewell* v. *Hodkinson*,[2] a conveyance of land in Manchester contained a covenant by the grantee to build in order to secure a chief rent. The land was wet and spongy. The plaintiff (who claimed under the grantee) built cottages on the land; but he did not, before doing so, drain the land, so as to make it more suitable to bear the weight of the cottages. Subsequently the ownership of the adjoining land (the title to which was derived from the same grantor) became vested in persons who employed the defendant to build a church thereon. With a view to effectually draining such adjoining land, and thereby securing a good foundation for the church, the defendant excavated deeply. The plaintiff's land was in consequence drained: it subsided; and the cottages were injured. The Court considered, that, the adjoining land being close to an important and populous city, the plaintiff's predecessor should have had strong grounds for supposing that it would be built upon; and would, if necessary for that purpose, be effectually drained. It moreover considered, that the plaintiff was guilty of neglect in not draining his own land in the

[1] Varying the order of V. C. Wood (1 J. & H. 145), as affirmed by Lord Campbell (2 De G. F. & J. 423); according to which the mine owner was at liberty to drain the water from the shaft, but not from the passages.

[2] L. R. 4 Ex. 248.

first instance. It was, therefore, held, that the plaintiff was without a remedy. It was at the same time intimated, that where an owner of land has obtained a grant for a particular object, and there are no exceptional circumstances in the case, he may properly insist, as against his grantor, that the withdrawal of subterranean water will deprive him of a reasonable degree of support for the due execution of that object; and may make his grantor liable accordingly.

Result of the cases.

The result of the law may be expressed as follows :—

1. The owner of land may obtain a right to support from water by express grant.

2. And where he has obtained a grant of the land for a particular object known to his grantor, his grantor cannot, in general, remove the water in the land, if support from the water is necessary for the due execution of such object.

3. But, in the latter case, if there are exceptional circumstances; as if the presence of the water is due to accident,[1] or if the plaintiff could not have inferred that the adjacent land would have been left undrained,[2] or if the plaintiff has himself neglected ordinary precautions;[3] he may be without a remedy.

PART F.—REMEDIES.

a. Surface Owner.

(*a*) *Existence of Remedies.*

Person liable.

It need hardly be said, that where the right of support is infringed, no remedy can be had against a person who was powerless to prevent the infringement. If, for instance, a mine owner demises the mine, and the lessee wrongfully withdraws support from the surface, it is against the lessee, and not against the lessor, that a remedy is available. In like manner, if a mine owner grants a license to work, and the license is irrevocable[4], the licensee is alone responsible for any damage for the

[1] See Elliot *v.* N. E. R. Co., 10 H. L. C. 333; *ante*, p. 348.

[2] See Popplewell *v.* Hodkinson, L. R. 4 Ex. 248, 252.

[3] *Ib.* p. 250, *per* Martin, Bramwell, and Channell, BB.

[4] See *ante*, pp. 251, 252.

wrongful withdrawal of support.[1] But if the license is revocable, and the licensor knows that damage may ensue from the contemplated acts of the licensee, the licensor may be made responsible. For he might have revoked the license, and so prevented the damage.[2] If, however, a mine owner demises the mine; and subsequently sells the land, excepting the mine, and reserving working liberties, and covenanting to make compensation for all damage to the surface through the exercise of the reserved liberties; and the lessee, in the exercise of his own rights, works, and withdraws the support; the remedy is against the lessor.[3]

Previously specified remedies.

Sometimes particular remedies are specified by anticipation, either by the parties themselves or by the Legislature, for the damage which may be sustained by the withdrawal of support; in such a way that those remedies only are available. And, when this is so, care should be taken, that the specified remedies are pursued.[4] But, in other cases, although particular remedies may be specified, the ordinary remedies may be also available, and the remedies may in fact be cumulative.[5]

Ordinary remedies—damages.

Subject to the necessity in proper cases of pursuing certain specified remedies, an ordinary action for damages will lie for infringing the right of support.[6] And if a reversioner and a lessee have both been injured in respect of the same property, each may recover in proportion to his injury.[7] It has been

[1] See Atkinson *v.* King, 2 L. R. (Ir.) 320.

[2] *Ib.*: see p. 337. See also Siddons *v.* Short, 2 C. P. D. 572. Cf. White *v.* Jameson, 18 Eq. 303.

[3] See Berkeley *v.* Shafto, 15 C. B. N. S. 79, 97, 99. Cf. Harris *v.* James, 45 L. J. Q. B. 545.

[4] Buccleuch *v.* Wakefield, L. R. 4 H. L. 377.

[5] Harris *v.* Ryding, 5 M. & W. 60; Smart *v.* Morton, 5 E. & B. 30; Roberts *v.* Haines, 6 E. & B. 643; Haines *v.* Roberts, 7 *ib.* 625; Dugdale *v.* Robertson, 3 K. & J. 695; Richards *v.* Jenkins, 17 W. R. 30.

[6] As to land in its natural state, see Harris *v.* Ryding, *u. s.*; Humphries *v.* Brogden, 12 Q. B. 739; Smart *v.* Morton, *u. s.*; Bonomi *v.* Backhouse, E. B. & E. 622; Backhouse *v.* Bonomi, 9 H. L. C. 503; Proud *v.* Bates, 34 L. J. Ch. 406, 412. As to land in its non-natural state, see Hilton *v.* Granville, 5 Q. B. 701; Roberts *v.* Haines, *u. s.*; Haines *v.* Roberts *u. s.*; Rogers *v.* Taylor, 2 H. & N. 828; Brown *v.* Robins, 4 *ib.* 186; Allaway *v.* Wagstaff, *ib.* 681; Hunt *v.* Peake, Joh. 705; Richards *v.* Jenkins, *u. s.*; Aspden *v.* Seddon, 1 Ex. D. 496; Chapman *v.* Day, 47 L. T. 705; Bell *v.* Love, 10 Q. B. D. 547; Normanton Gas Co. *v.* Pope, 48 L. T. 666, affirmed 52 L. J. Q. B. 629.

[7] Stroyan *v.* Knowles, Hamer *v.* Knowles, 6 H. & N. 454.

already seen, that only one action will lie for all the injurious consequences of the removal of support from land in its natural state.[1] But, as has been already seen, the owner can recover in such action for all damage, past, present, and prospective.[2] It has also been seen, that where land has been artificially burdened ; and there is no right to support for the artificial weight ; and support is withdrawn ; but it is shown, that, even if the land had been in its natural state, it would have been injured ; the owner's remedy will not be confined to such damages as he would have been entitled to recover if the land had remained in its natural state. He will, as has been already seen, be also entitled to recover for the injury to the artificial weight.[3]

Injunction.

An injunction may also, in general, be obtained to restrain the future infraction of the right.[4] And, although in some cases it will not be obtained unconditionally, it may be obtained upon the terms of paying compensation to the mineral owner.[5] And it will not in general be refused on the mere ground, that the injury is of such a nature as to be capable of being satisfied by damages.[6] However, where the party seeking it has, with knowledge of the probable consequences, abstained from interference until the workings in question have proceeded for a considerable distance, and considerable expense has been incurred, he will not, having regard to the serious injury which may be caused by stopping mining operations,[7] be allowed an injunction ; but will be left to his remedy in damages.[8] And an injunction will not usually be directed *ab ante ;* unless the defendant claims the right to work in an improper manner ;[9]

[1] *Ante*, p. 289.

[2] *Ib.*

[3] *Ante*, p. 301.

[4] As to land in its natural state, see Proud *v.* Bates, 34 L. J. Ch. 406. As to an underlying stratum, see Mundy *v.* Rutland, 23 Ch. D. 81. As to land in its non-natural state, see Dugdale *v.* Robertson, 3 K. & J. 695 ; Hunt *v.* Peake, Joh. 705 ; Elliot *v.* N. E. R. Co., 10 H. L. C. 333 ; N. E. R. Co. *v.* Crossland, 2 J. & H. 565 ; 2 De G. F. & J. 550 ; G. W. R. Co. *v.* Smith, 2 Ch. D. 235 ; nom. Smith *v.* G. W. R. Co., 3 App. Cas. 165 ; Siddons *v.* Short, 2 C. P. D. 572.

[5] M. R. Co., *v.* Checkley, 4 Eq. 19 : see *ante*, p. 328.

[6] Siddons *v.* Short, *u. s.*, 577.

[7] Hilton *v.* Granville, 1 Cr. & Ph. 297. See also *ante*, p. 62 n.[1] and other cases there cited.

[8] See Hilton *v.* Granville, 1 Cr. & Ph. 283. 296, 297, 298.

[9] Siddons *v.* Short, 2 C. P. D. 572. Cf. Buchanan *v.* Andrew, L. R. 2 Sc. & D. 288.

and it appears reasonably probable, that damage will ensue in consequence.[1] When the infraction of the right is restrained, it will, consistently with the principle that degrees cannot be measured out to which the right may extend,[2] be restrained in the most general words, and without specifying any limits within which the mineral workings may be carried on.[3] In a proper case a mandatory injunction may be obtained.[4]

A litigant may, in a proper case, obtain, upon interlocutory application, liberty to inspect his neighbour's mine and workings, and the working plans connected therewith, for the purpose of ascertaining, whether his right of support has been infringed.[5] Inspection.

(β) *Loss of Remedies.*

If six years have elapsed since the right of support, whether for land in its natural state, or for land in its non-natural state, has been infringed, the remedy will be barred.[6] But it must be remembered that, although something may have been done, Stat. of Limitations.

[1] Birmingham *v.* Allen. 6 Ch. D. 287. 288. The Court will sometimes, where there is a conflict of evidence, or otherwise in cases of doubt, take an independent report from a referee, and act upon it: see Mundy *v.* Rutland. 23 Ch. D. 97. 98.

[2] *Ante*, p. 290.

[3] As to land in its natural state, see Bell *v.* Joell. Set. 203. As to an underlying stratum, see Mundy *v.* Rutland. *u. s.*. 94. 98. As to land in its non-natural state, see Cal. R. Co. *v.* Sprot. 2 Macq. 454; Hunt *v.* Peake. Joh. 713: Elliot *v.* North East. R. C.. 10 H. L. C. 333: N. E. R. Co. *v.* Crossland. 2 J. & H. 580; 4 De G. F. & J. 560.

[4] See the form of the order in Bell *v.* Joell, Set. 203.

[5] See Wall *v.* Dunn. Set. 202; Baynton *v.* Leonard. *ib.* 203. For the forms of a declaration as to a plaintiff's right of support, and an injunction staying the working of minerals necessary to such support, and that the defendant should permit the plaintiff to have access to the mines for the purpose of making supports, see Dugdale *v.* Robertson. 3 K. & J. 701. For the form of a declaration as to a plaintiff's right to compensation in respect of damage by mining under his houses or by subsidence of the soil, with an injunction and an enquiry as to damages, see Hunt *v.* Peake. Joh. 713. For the form of an injunction, restraining in general words the infraction of the right of support, see Bell *v.* Joell. Set. 203; Baynton *v.* Leonard. *ib.*; Wall *v.* Dunn. *ib.* 202 (a case of support for a church): Hunt *v.* Peake. Joh. 713: Elliot *v.* N. E. R. Co.. 10 H. L. C. 333: N. E. R. Co. *v.* Crossland. 2 J. & H. 580: 4 De G. F. & J. 560: Mundy *v.* Rutland. 23 Ch. D. 81. 94. 98 (a case of support for the barrier of an underlying stratum). And for the form of an order giving liberty to inspect, see Wall *v.* Dunn, *u. s.*; Baynton *v.* Leonard. *u. s.*

[6] Bonomi *v.* Backhouse. E. B. & E. 622; Backhouse *v.* Bonomi. 9 H. L. C. 503.

which afterwards produces damage, the right is not infringed until damage actually takes place.[1]

Acquiescence.

The remedy will not easily be barred by acquiescence. For instance, the lord of a manor, who by the permission of his copyholder works under the copyhold, and in the course of his workings injures the copyhold buildings, will not escape liability by alleging that the copyholder must have known the probable results of the working.[2]

Death of wrongdoer.

Whether the maxim, *actio personalis moritur cum personâ*, applies upon the death of the wrongdoer, is a question, which has been discussed, but not decided.[3]

b. Mine Owner.

Mine owner.

A mine owner may also, in some cases, although not allowed to work, so as to withdraw support from the surface, have a remedy against the surface owner for being obliged to leave his minerals unworked. Thus, a mine owner, disabled from working, may be entitled to receive compensation under s. 68 of the Lands Cl. Cons. Act, 1845.[4] So, a mine owner, disabled from working, may be entitled to receive compensation under s. 6 of the Gas Cl. Act, 1847.[5] And a mine owner, disabled from working or from working except at a disadvantage, may be entitled to compensation, and to damages for severance and other damage, under ss. 78 and 81[6] of the Rail. Cl. Act, 1845, or ss. 22 and 25[7] of the Wat. Cl. Act. The measure of compensation, and the measure of damages for severance, have been already adverted to.[8] If a particular remedy is specified by anticipation, it may be, that that remedy only is available.[9]

[1] *Ib.*: *ante*, p. 288.

[2] See Bankart *v.* Houghton, 27 Beav. 433.

[3] See Chapman *v.* Day, 31 W. R. 767.

[4] See G. W. R. Co. *v.* Smith, 2 Ch. D. 235; Smith *v.* G. W. R. Co., 3 App. Cas. 165; *ante*, pp. 343, 344.

[5] 10 & 11 Vict. c. 15: see Normanton Gas Co. *v.* Pope, 25 L. J. Q. B. 629 (*ante*, p. 312).

[6] *Ante*, pp. 6, 7, n.

[7] *Ante*, p. 9.

[8] *Ante*, pp. 343, 347. See also, in connexion with s. 85 of Lds. Cl. Act, *ante*, p. 347.

[9] See Fenton *v.* Trent, &c., Co., 9 M. & W. 203; where it was held, that the remedy was a feigned issue. See also Normanton Gas Co. *v.* Pope, *u. s.* (*ante*, p. 312), a case under the Gas Cl. Act, 1847 (10 & 11 Vict. c. 15, ss. 6, 40); where it was held, that the remedy was arbitration.

CHAPTER XVI.

NEIGHBOURS—ROADWAYS AND AIRWAYS.

Sect. 1.—NATURE OF RIGHT OF WAY—GENERALLY.

Right of way is an easement.

A RIGHT of way *in alieno solo*[1] is an incorporeal right by way of easement.[2] And it is none the less an easement, because it may be a necessary incident to the enjoyment of his property by the dominant owner.[3]

Servient owner may use or alter the way.

The dominant owner cannot prevent the servient owner from using the way. If he could, his right of way would not be an easement, but a right of property in the land occupied by the way.[4] Nor can he prevent the servient owner from making alterations in the way, provided that it is not thereby rendered an obstruction to the dominant owner.[5]

Right must generally originate in grant or prescription.

The Crown has apparently a right of way for the carriage through the lands of a subject of the produce of mines of gold and silver;[6] and also of saltpetre;[7] and probably of treasure

[1] As to rights of way *in proprio solo*, see *ante*, pp. 67, 68, 69, 87, 88, 89.

[2] Hewlins *v.* Shippam, 5 B. & C. 229; Thicknesse *v.* Lancaster Canal Co., 4 M. & W. 492, 495; Ramsay *v.* Blair, 1 App. Cas. 706, per Lord Selborne.

[3] See Ramsay *v.* Blair, *u. s.*, *per* Lord Selborne. It is respectfully submitted, that the propositions laid down by Lord Chelmsford at p. 703 are not consistent with principle. Cf. Bourne *v.* Taylor, 10 East. 205.

[4] See R. *v.* Jolliffe, 2 T. R. 95. In R. *v.* Bell (7 T. R. 598) it was decided, that the grantee of a wayleave for carrying coal was rateable to the poor as occupier; but only because he had enclosed the way, and excluded all persons from using it.

[5] Bradburn *v.* Morris, Morris *v.* Bradburn, 3 Ch. D. 821, 823. A right of way cannot, properly speaking, be the subject of an exception, or a reservation. For it is neither part of the thing granted; nor does it, like a rent, issue out of the thing granted. Where a grantor purports to except or reserve a right of way, it really takes effect as an easement newly created by way of express regrant by the grantee. See Wickham *v.* Hawker, 7 M. & W. 68; Durham, &c., Co. *v.* Walker, 2 Q. B. 940; Proud *v.* Bates, 34 L. J. Ch. 406; Hamilton *v.* Graham, L. R. 2 Sc. & D. 168.

[6] See *ante*, pp. 281, 282.

[7] See *ante*, p. 282, n.[2].

trove.[1] Subject to this, a right of way *in alieno solo*, being an incorporeal right by way of easement,[2] must have its origin in grant, express or implied; or in prescription. A right of way founded upon grant must, to be legally effectual, be created by deed.[3] A right of way by prescription may be acquired at common law either by an enjoyment from time immemorial; or, upon the fiction of a modern lost grant, by an enjoyment for twenty years. Or, it may be acquired under the 2nd section[4] of the Prescription Act.[5] However, unless the enjoyment is as of right, a right of way cannot be acquired under the Prescription Act.[6]

Sect. 2.—Roadways—Express Grant.

a. Kind of Way.

(*a*) *Unlimited Grant.*

Unlimited grant.

Where there is a general and unqualified grant of the way intended to be made or used, the grantee may make or use any kind of way he pleases.[7]

[1] See *ante*, p. 282, n. [2].

[2] See preceding page.

[3] See Hewlins *v.* Shippam, 5 B. & C. 229. Rights of way are sometimes claimed as being legally appurtenant to the subject matter of a grant; and at other times as being contained in the general words of an instrument. For the law in such cases, see L. C. Conv. 170, 175. See also Conv. Act, 1881, s. 6. Mining rights of way are, as may be supposed, usually of too much importance to be allowed to depend on either of such grounds. For claims to rights of way for mining purposes based on expectation followed by expenditure, see Clavering's Case, 5 Ves. 690; Powell *v.* Thomas, 6 Ha. 300; Meynell *v.* Surtees, 3 Sm. & G. 101. Cf. Bankart *v.* Tennant, 10 Eq. 141; Willmott *v.* Barber, 15 Ch. D. 104. See also Bell *v.* Midland R. Co., 3 De G. & J. 686; Mold *v.* Wheatcroft, 27 Beav. 510, 516.

[4] Cited *ante*, p. 314, n. [8].

[5] See Monmouth Canal Co. *v.* Harford, 1 Cr. M. & R. 614; Cowling *v.* Higginson, 4 M. & W. 245; Rogers *v.* Taylor, 1 H. & N. 706; Bradburn *v.* Morris, Morris *v.* Bradburn, 3 Ch. D. 812. In Rogers *v.* Taylor two pleas under the Act of prescriptive rights for 20 years and 40 years to cut through the surface of a waste in a manor in order to reach and work quarries, and remove the stones, were held good.

[6] Monmouth Canal Co. *v.* Harford, *u. s.*; Cowling *v.* Higginson, *u. s.*

[7] See Beaufort *v.* Bates, 3 De G. F. & J. 393; Cannon *v.* Villars, 8 Ch. D. 420.

(β) *Grant clearly Limited.*

Where the way intended to be made or used is clearly defined by the instrument of grant, and there is nothing in the instrument to indicate a contrary intention, the grantee of the right cannot make or use any other kind of way than that which has been granted. He cannot, for instance, where a right of passage *simpliciter* is granted, make or use a tramway or railroad ;[1] or, where a right of waggon-way is granted, make or use a tramway or railroad ;[2] or, where a right of railroad *simpliciter* is granted, make or use a railroad to be traversed by locomotive engines.[3] And he cannot justify the making or using a different kind of way from that which has been granted on the ground, that no more land has been thereby taken, or that the landowner has not been thereby in any respect injured. He has no right to take the land at all, except for the particular kind of way indicated.[4]

Grantee of limited right cannot have other way than that granted.

(γ) *Grant not clearly Limited.*

Where the way intended to be made or used is not clearly defined by the instrument of grant, the grantee is not entitled to make or use any kind of way he pleases; without regard to the circumstances of the case, or the necessities of his position.[5] The grantee may, however, in such a case, claim the right to make or use some particular kind of way; and this claim may be contested by the servient owner.

Difficulties where grant not clearly limited—generally.

Under such circumstances the nature of the *locus in quo*, or of the *terminus a quo*, or of the *terminus ad quem*, may, taken in connexion with the language of the grant, serve to determine the propriety of the claim. If, for instance, the *locus*

Physical surroundings.

[1] Beaufort *v.* Bates, 3 De G. F. & J. 392; Neath Canal Co. *v.* Ynisarwed Colliery Co., 10 Ch. 450.

[2] See Farrow *v.* Vansittart, 1 R. C., 609; Bidder *v.* North Staff. R. Co., 4 Q. B. D. 429.

[3] *Ib.* Cf. the law, where the right is claimed by prescription, *infra*, Sect. 4. *a*.

[4] Farrow *v.* Vansittart, *u. s.*, 609, 610.

[5] See Farrow *v.* Vansittart, *u. s.*, 609. There the grant was of "free ingress, egress, and regress, wayleav and passage, to and from" mines.

in quo is a metalled road, with pavement on both sides, the presumption will, if not inconsistent with the language of the grant, be, that it was intended to be used in accordance with the manner of its construction; namely, not merely as a foot-road, but as a road for horsemen and carts.[1] But, if it is only paved with flagstones, and is not sufficiently wide to enable a waggon or cart to pass, the presumption may be, that it was not intended to be used for waggons or carts.[2] If, again, one end of the way in question runs into and forms part of a public highway, over which parties do not presumably contemplate making railways or tramways, it will not be presumed that it was intended to be used as a railway or tramway.[3]

Language of grant.

Senhouse *v.* Christian.

The language of the grant has frequently been the subject of discussion. Thus, in *Senhouse* v. *Christian*,[4] a grant was made of a "free and convenient way, as well an horseway as a footway, as also for carts, waggons, wains, and other carriages whatsoever, in, through, over, and along" a slip of land, for the purpose of carrying coals from a colliery to the common highway. The grantee could not commodiously carry the coals unless by laying down a framed waggon-way; and this he was, accordingly, held entitled to do. So in *Dand* v. *Kingscote*.[5] There was there a grant of lands, "excepting and reserved out of the grant all mines of coals within the fields and territories of Amble aforesaid, together with sufficient wayleave and stayleave to and from the said mines, with liberty of sinking and digging pit and pits." The Court held the words "sufficient wayleave" to mean such a description of wayleave as would be reasonably sufficient to enable the coal owner to get from time to time all seams of coal to a reasonable profit.[6]

Dand *v.* Kingscote.

[1] See Cannon *v.* Villars, 8 Ch. D. 420, *per* Jessel, M. R.

[2] *Ib.*, p. 421.

[3] Bidder *v.* North Staff. R. Co., 4 Q. B. D. 430. Cf. Beaufort *v.* Bates, 3 De G. F. & J. 393, 394. If the road is the only means of access to the grantor's mansion house, the grantee may not be entitled to lay down iron plates: see the Scotch case of Galbraith *v.* Eglington Co., 7 Sess. Cas. (3rd ser.) 167.

[4] 1 T. R. 560.

[5] 6 M. & W. 174.

[6] See also Cannon *v.* Villars, *u. s.*, 415: and cf. Bidder *v.* North Staff. R. Co., *u. s.*, 429, 430. In Pit *v.* Claverinth, 1 Barn. 318, a grant of a "convenient wayleave for the carriage of coal through a waste," was held not to entitle the grantee to a right of waggon-way: but this case must be taken to be overruled by Dand *v.* Kingscote.

In *Bishop* v. *North*[1] an Act of 32 Geo. 3, for making a canal, empowered the owners of any mines of coal within certain parishes to make any railways or roads to convey their coals to the canal over the lands of any person; making satisfaction for the damage thereby occasioned. It was held, that the Act empowered such owners to make railways to be traversed by locomotive engines. In *Bishop* v. *North* there was a compensation clause for the damage which might be occasioned by the making of the way; and it seems clear, that the decision would not have been the same, if this clause had been absent. It would have been a serious thing to hold, that, under such a grant as was there used, the servient owner was without a remedy of any kind; although his land was cut and levelled; and he was precluded from thereafter using it, except in one particular way, and with carriages of one particular construction.[2] There was not, moreover, in *Bishop* v. *North*, any suggestion, that the running of locomotives would create a public or private nuisance, or be a source of danger to the neighbourhood. In all such cases the probability or improbability of a nuisance being created, or of accidents occurring, is a material element in arriving at a decision.[3] However, in *Bishop* v. *North*, the instrument in question was an Act of 32 Geo. 3. The mere circumstance, therefore, that locomotive engines were not in use at the date of the instrument, and could not, accordingly, be presumed to have been within the contemplation of the legislature, was considered immaterial.[4]

Bishop v. North.

Bidder v. *North Staffordshire Rail. Co.*[5] was differently decided. There, however, the grant was not, as in *Senhouse* v. *Christian*, *Dand* v. *Kingscote*, and *Bishop* v. *North*, a grant

Bidder v. North Staf. R. C.

[1] 11 M. & W. 418.

[2] However, in Dand *v.* Kingscote, 6 M. & W. 174, there was no compensation clause for injuries done by making ways; and the Court nevertheless intimated, that a question (which was raised, but not decided), as to the coalowner's right to make a railway, with cuttings and embankments, and fenced in so as to exclude the surface owner, was at all events arguable. Cf. Bidder *v.* North Staff. R. Co., 4 Q. B. D. 412, 430.

[3] See Bishop *v.* North, 11 M. & W. 426, 427; Bidder *v.* North Staff. R. Co., *u. s.*, 412, 430.

[4] See also Senhouse *v.* Christian, 1 T. R. 567; Dand *v.* Kingscote, *u. s.*; McDonnell *v.* Kenneth, 1 Ir. C. L. Rep. 113: and cf. Baxendale *v.* McMurray, 2 Ch. 794; Newcomen *v.* Coulson, 5 Ch. D. 133.

[5] 4 Q. B. D. 412.

of a way in any place convenient for the working; for the purposes of the working; and for the exclusive use of the grantee. It was, on the contrary, a grant of a way in a particularly defined place. It was not a grant for the purposes of the working. And it appeared to be for the use of others as well as of the grantee; the grantee being under an obligation to maintain and keep in repair the subject matter of the grant.[1] And where, to a liberty to make and use roads and ways, there is added a liberty to do all such other acts as may be deemed necessary or expedient for "conveying the iron ore to the furnaces and other works on the lands," it is probable, that, having regard to the latter liberty, railroads and tramways are not included in the former.[2]

One liberty restricted by another.

(δ) *Result of the Cases.*

Result of the cases.

The result of the preceding cases may be expressed in the following propositions:—

(1.) Where there is a general and unqualified grant of the way intended to be made or used, the grantee may make or use any kind of way he pleases.

(2.) Where the kind of way intended to be made or used is clearly defined by the instrument of grant, the grantee cannot, *primâ facie*, make or use any other kind of way; although such other kind of way may not be more onerous to the servient tenement.

(3.) Where the kind of way intended to be made or used is not clearly defined, the nature of the *locus in quo*, or of the *terminus a quo*, or of the *terminus ad quem*, may, taken in connexion with the language of the grant, serve to determine the kind of way.

(4.) Where the words "convenient wayleave," "sufficient wayleave," "necessary wayleave," and the like, are used as incident to a grant; or where a grantee is empowered to make ways "to convey his coals;" the grantee may in general make

[1] See pp. 429, 430. Affirmed by the House of Lords: nom. Elliot *v.* North Staff. R. Co., W. N. 1881. p. 52.

[2] See Beaufort *v.* Bates, 3 De G. F. & J. 381, 393, 394.

waggon-roads or tramroads, or even (if only there be a clause securing compensation to the servient owner for any damage he may sustain, and it do not appear, that accidents are likely to occur,) railroads to be traversed by locomotive engines; according to the particular exigencies of each particular case.

(5.) However, to enable him to do so, the grant must have been for the purposes of the working, and for the exclusive use of the grantee.

(6.) If the grantee is, in other respects, entitled to make a particular kind of way, he cannot be prevented from so doing, merely because that kind of way was not in use at the date of the instrument under which he claims; and could not, therefore, be presumed to have been within the contemplation of the parties, or (as the case may be) of the legislature.

b. Application.

(*a*) *Unlimited Grant.*

Unlimited grant.

Where the purposes, for which a way may be applied, are granted generally, and without qualification, the grantee may use the way for any purpose he thinks proper.[1]

(*β*) *Grant clearly Limited.*

Grantee of limited right cannot use way for other purpose than that granted.

Where the purposes, for which a way may be applied, are specified in the instrument of grant, and there is nothing in the instrument to indicate a contrary intention, the grantee of the right cannot use the way for any other purpose than the particular purpose for which the grant is made.[2] Where, for instance, the way is granted for all purposes except that of carrying minerals;[3] or for agricultural purposes;[4] or for other definite

[1] Hughes *v.* Chester, &c. R. Co., 3 De G. F. & J. 352; reversing Chester, &c., R. Co. *v.* Hughes, 1 Dr. & Sm. 524.

[2] See Hamilton *v.* Graham, L. R. 2 Sc. & D. 169: see also Jackson *v.* Stacey, Holt's N. P. C. 455; Stafford *v.* Coyney, 7 B. & C. 257; Cowling *v.* Higginson, 4 M. & W. 245. See also Dand *v.* Kingscote, 6 M. & W. 174; Farrow *v.* Vansittart, 1 R. C. 609; Durham, &c., Co. *v.* Walker, 2 Q. B. 940; Midgley *v.* Richardson, 14 M. & W. 595; Bowes *v.* Ravensworth, 15 C. B. 512; Hedley *v.* Fenwick, 3 H. & C. 349; Proud *v.* Bates, 34 L. J. Ch. 406.

[3] Stafford *v.* Coyney, *u. s.*

[4] Jackson *v.* Stacey, *u. s.*; Bradburn *v.* Morris, Morris *v.* Bradburn, 3 Ch. D. 812.

purposes, not including mining or quarrying purposes;[1] it cannot be used for mining or quarrying purposes. So, where there is a grant of a right of way for the carriage of minerals, the way cannot be used for general purposes;[2] or for the conveyance of passengers.[3] So, where a right of way is granted for the conveyance of minerals from a particular mine, the way cannot be used for the conveyance of minerals from any other mine.[4] So a grant of a right of way for carrying minerals to or from a particular place, as a terminus, will not justify going over that place to or from another place beyond it;[5] unless such particular place be a highway.[6] And a mine owner cannot justify the user of a way for any other purpose than the particular purpose for which the grant has been made, on the ground, that no substantially greater burthen has been thereby put upon the servient tenement.[7]

(γ) *Grant not clearly Limited.*

Difficulties where grant not clearly limited—generally.

Where the purposes, for which a way may be applied, are not clearly defined by the instrument of grant, the grantee is not entitled to apply it for any purpose he pleases; without regard to the circumstances of the case, or the necessities of his position.[8] The grantee may, however, in such a case, claim the right to apply it for some particular purpose; and this claim may be contested by the servient owner.

Dand *v.* Kingscote.

In *Dand* v. *Kingscote*,[9] the owner of two adjoining pieces of land conveyed them by separate deeds to different persons. There was in one of the deeds an exception and reservation in these words:—"Excepting and reserved out of the grant all mines of coals within the fields and territories of Amble

[1] Cowling *v.* Higginson, 4 M. & W. 245.

[2] Durham, &c., Co. *v.* Walker, 2 Q. B. 240; Meynell *v.* Surtees, 3 Sm. & G. 117. 118.

[3] Farrow *v.* Vansittart, 1 R. C. 609; Durham, &c., Co. *v.* Walker, *u. s.*

[4] Dand *v.* Kingscote, 6 M. & W. 174; Durham, &c., Co. *v.* Walker, *u. s.* See also Newmarch *v.* Brandling, 3 Swanst. 99, 107, 108; and cf. Farrow *v.* Vansittart, *u. s.*

[5] See Howell *v.* King, 1 Mod. 190; Colchester *v.* Roberts, 4 M. & W. 769. See also James *v.* Cochrane, 8 Exch. 556; *post*. p. 365.

[6] Colchester *v.* Roberts, *u. s.*

[7] Farrow *v.* Vansittart, *u. s.*

[8] *Ib.*

[9] 6 M. & W. 174.

aforesaid, together with sufficient wayleave and stayleave to and from the said mines, with liberty of sinking and digging pit and pits." The other deed contained precisely similar words, except that "Hawxley" was substituted for "Amble." It was held, that the coal owner was not entitled to carry over the land comprised in the first deed the coal got under the land comprised in the second deed; and that, although the coal underneath both pieces of land formed part of the same mineral field.

Durham, &c., Co. *v.* Walker.

In *Durham, &c., Rail. Co.* v. *Walker*,[1] the Dean and Chapter of Durham demised certain lands to the defendant. They excepted and reserved the mines and quarries; with full power to dig, win, work, get, and carry away, the same; and with free ingress, egress, and regress, wayleave, and passage, to and from the same, "or to or from any other mines, or quarries, lands, and grounds." Afterwards the Dean and Chapter granted liberty to the company to enter the demised lands; and to make and maintain a double way over them; and to use and grant the use of such way for the conveyance of passengers, coal, and goods. It was contended, that the Dean and Chapter had power under the reservation, to grant wayleaves either (1) over all or any part of the lands demised, without any restriction as to the uses to which the wayleaves might be applied; or (2) for the purpose of carrying coals and minerals from any mines whatsoever; or, at all events (3), for the purpose of carrying their own minerals, whether raised from under the lands demised, or any other lands. The Court, however, considered, that both the wayleave to or from the excepted mines, and the wayleave to or from other mines, lands, and grounds, were only mentioned in connexion with the excepted mines, and were not mentioned as a distinct matter of exception or reservation. It was, accordingly, held, that the right reserved was only that of making and using ways, and granting wayleaves for the purpose of getting the excepted minerals.

Midgley *v.* Richardson.

In *Midgley* v. *Richardson*,[2] an Inclosure Act for inclosing moors and commons in a manor in the county of Durham provided, that the Bishop of Durham and his successors might work

[1] 2 Q. B. 940.

[2] 14 M. & W. 595, 607, 608.

and enjoy all mines and quarries lying under the moors and commons; together with all convenient and necessary ways and wayleaves, and liberty of winning and working the mines belonging to the see wheresoever the same should be, and of leading and carrying away all the coals gotten thereout, "or out of any other lands or grounds whatsoever." There was no power under the Act of going to the mines of strangers for the purpose of working them; nor was there any compensation provided for injury from the carriage of minerals from such mines. Upon these two circumstances it was held, that the Bishop was not entitled to carry over the inclosed lands coals got out of other mines, which he worked within the manor, but which did not belong to the see. The words, "or out of any other lands or grounds whatsoever," were interpreted as meaning lands or grounds other than mines; *e. g.*, quarries, chalk pits, marl pits, &c., which did not strictly come under the description of mines.[1]

Bidder *v.* North Staf. R. C.

A decision more favourable to the mine owner was come to in the somewhat similar case of *Bidder* v. *North Stafford. Rail. Co.*[2] There the lessees of mines were authorized to take and use "full and sufficient rail and other ways, paths, and passages to and for the said lessees and their agents, servants, and workmen or others," to carry away "all or any of the coal, cannel, slack, iron, and ironstone, the produce of the mines thereby demised, or any other mines." It was contended, that, unless some limitation were put upon the words "or any other mines," the produce of mines which neither adjoined, nor were worked by the lessees, might be carried over the ways in question; and that those words should, accordingly, be read, as if after them were added the words "and brought to the surface on the demised

[1] Followed in Hedley *v.* Fenwick, 3 H. & C. 349. See also Farrow *v.* Vansittart, 1 R. C. 602 (where an exactly similar lease to that in Durham, &c., Co. *v.* Walker came before the Court to be construed); Wallis *v.* Harrison, reported together with Durham, &c., Co. *v.* Walker, in 11 L. J. Exch. 440. Cf. Brunton *v.* Hall, 1 G. & D. 207. Cf. also Bowser *v.* Maclean, 2 De G. F. & J. 415; Jegon *v.* Vivian, 6 Ch. 742; Eardley *v.* Granville, 3 Ch. D. 826. As to the meaning of "mine," as distinguished from "quarry," see *ante*, pp. 3 *et seq.* See, further, as to Midgley *v.* Richardson, *post*, p. 365.

[2] 4 Q. B. D. 412, 430, 431. Affirmed by the House of Lords: nom. Elliot *v.* North Staf. R. C., W. N. 1881, p. 52.

land." It was considered, that the authority was limited to mines worked by the lessees; but that, even if this were not so, there was no ground for putting any limitation whatsoever on the generality of the language of the lease.

A decision favourable to the mine owner was also come to in *James* v. *Cochrane*,[1] where the language of a grant, referring in other respects to a particular place as a terminus, was held to entitle the grantee to use it as a thoroughfare. There the lessees of a mine covenanted to leave unworked a barrier of coal between the demised mine and the adjoining mines; and not to open any communications in such barrier, except where the lease gave them liberty to do so. The liberty was to make communications through the barrier for the purpose of conveying underground coals gotten in any adjoining colliery from such colliery into the demised mine; and to convey such coals accordingly; and from thence to "convey and carry away" all such coals; "and also to draw to bank at any of the pits sunk or to be sunk" in the demised lands the coals from such adjoining colliery. No pits were ever sunk by the lessees in the demised lands. It was held, that the lessees had liberty to carry the coal of adjoining mines through a breach in the barrier into the demised mine; and thence, through another breach in the barrier, into adjoining mines on the other side; and to raise it to the surface through shafts in the last-named mines.[2] James v. Cochrane.

And, if, independently of the language of the grant, it is reasonable, from the circumstances of the case, to make a presumption in favour of the owner of the mine or quarry, a construction may be adopted, which might not otherwise be adopted. Thus, in *Midgley* v. *Richardson*,[3] an Inclosure Act for inclosing moors and commons in a manor in the county of Durham contained a saving of the rights of the Bishop of Durham as lord of the manor. The other material provisions of the Act have been already stated.[4] It was probable, that, at the passing of the Act, the Bishop was in the habit of carrying over the inclosed lands coals from mines wherever situate; and he had Midgley v. Richardson.

[1] 8 Exch. 556.

[2] See, further, as to this case, *ante*, pp. 231, 332.

[3] 14 M. & W. 595.

[4] *Ante*, pp. 363, 364.

only received a very small compensation for the allotment. It was held, that he was entitled to carry over the inclosed lands, not merely the coals got within those lands, but also those got out of any other mines belonging to the see. The Court observed that, having regard to his probable position at the passing of the Act, and to the amount of compensation which he had received, it was reasonable to presume as far as possible in the Bishop's favour.[1]

Bowes *v.* Ravensworth.

So in *Bowes* v. *Ravensworth*.[2] There an Inclosure Act enacted that nothing therein contained should be construed to prejudice the rights of the lord of a manor as such lord; but that the lord should enjoy all mines, minerals, and quarries belonging to the manor, in as full and ample a manner as if the Act had not been made; with liberty to make ways along the waste lands intended to be inclosed; and to do every other act then or thereafter in use for working, leading, and carrying away the said mines, minerals, and quarries; and also for "leading, carrying, and conveying the coals and produce of any other mines and minerals from or under any other lands and grounds whatsoever." The lord constructed a railway, and used it for the purpose of carrying coke; which, however, was not made from coal worked out of the wastes in question. The Court considered, that the intention was as clear as possible, that the rights previously enjoyed by the lord of the manor were not to be interfered with. It was, accordingly, held, that "produce of any other mines and minerals" did not mean produce of mines and minerals other than coals, but produce of mines and minerals other than the mines, minerals, and quarries before mentioned; and that the mine owner was, therefore, justified in his user.

Proud *v.* Bates.

So in *Proud* v. *Bates*.[3] In that case (the facts of which have been already sufficiently stated[4]) the lessor claimed a right to carry along the way in question, as well minerals worked within the excepted mines, as also minerals within the manor, although not under the demised property. It was held,[5] that the lessor was entitled to an absolute wayleave, and not merely to a right

[1] See, further, as to this case, *ante*, pp. 363, 364.

[2] 15 C. B. 512.

[3] 34 L. J. Ch. 406.

[4] *Ante*, p. 69.

[5] *Per* Wood, V.-C.

of way for the purpose of working the excepted minerals. The Court observed, that the circumstance of the lessor having been owner of the entire manor favoured the presumption, that it was not intended, that the wayleave should be used merely for working the excepted minerals. The Court also observed that, if the wayleave were of the restricted kind contended for, the mine owner would not have obtained any larger powers than he would have obtained by implied grant, if there had been a mere exception of the mines, without more ;[1] and that, this being so, it was reasonable to infer, that, what was expressed widely, was not intended to be confined to a restricted right. This reasoning was evidently approved of by the same learned judge in a more recent case.[2] But it does not seem to have been considered in the preceding cases.[3]

(δ) *Result of the Cases.*

Result of the cases.

The result of the preceding cases may be expressed in the following propositions :—

(1) Where the purposes, for which the way may be applied, are granted without qualification, the grantee may use the way for any purpose.

(2) Where the purpose is specified, the grantee cannot, *primâ facie*, use the way for any other purpose ; although such other purpose may not be more onerous to the servient tenement.

(3) Where the words "convenient wayleave," "sufficient wayleave," "free wayleave and passage to and from," and the like, are used as incident to a grant or exception, the way can only, *primâ facie*, be used for getting the granted or excepted minerals.

(4) The *primâ facie* disability will frequently be removed by the addition of such words as "or any other mines or quarries ;" and a limitation will not, at the present day, be easily put upon the generality of such words.[4]

[1] See *ante*, pp. 273, 274.

[2] Hamilton *v.* Graham, L. R. 2 Sc. & D. 175.

[3] See Dand *v.* Kingscote, 6 M. & W. 174 ; Durham, &c., Co. *v.* Walker, 2 Q. B. 940 ; Midgley *v.* Richardson, 14 M. & W. 595 ; Bowes *v.* Ravensworth, 15 C. B. 512.

[4] See Bidder *v.* North Staf. R. C., cited *ante*, p. 364.

(5) Evidence of an intention, that no such disability should exist, may be afforded by such circumstances as that the owner of the mine or quarry was previously to the instrument, under which he claims the right in question, entitled to exercise that right, and that his previous right was not intended to be interfered with.

(6) In doubtful cases the consideration, that, if the right claimed by the owner of the mine or quarry were not conceded, he would not have obtained any larger powers than he would have obtained by implied grant, may turn the scale in his favour.

c. Direction—Dimensions—Construction—Maintenance.

(*a*) *Direction.*

Where direction limited.

Where the direction, which the way may take, is indicated with sufficient clearness, the grantee of a right of way cannot, *primâ facie*, make or use a way in any other direction. Thus, the grantee of a free and convenient way "in, through, over, and along" a slip of land, was held not to be entitled to make a transverse way across the land.[1] And in such a case, the mere fact, that the way indicated is rough or inconvenient, will not justify the grantee in making or using a way in another direction.[2]

Where direction not limited.

Where the direction, which the way may take, is not indicated with sufficient clearness, as where the words used are "free ingress, egress, and regress, wayleave, and passage to and from" the mines in question, the grantee is not entitled, at pleasure, to make a way in any direction, without regard to the necessities of his workings.[3] And his right in such a case to make the way in a particular direction will usually depend on whether he acts with reasonable skill and discretion.[4] If, however, he does so act, he will not be confined to the shortest practicable course to the terminus, to which his minerals are to be carried; if a more circuitous route

[1] Senhouse *v.* Christian, 1 T. R. 560.

[2] Wimbledon, &c., Cons. *v.* Dixon, 1 Ch. D. 370.

[3] Farrow *v.* Vansittart, 1 Ra. Ca. 609.

[4] Abson *v.* Fenton, 1 B. & C. 195.

would be more beneficial.[1] Nor will he be confined to the shortest course to the nearest highway in the direction of that terminus, and no further; if, by traversing the highway, he could work at less expense.[2] If the dominant owner is, in other respects, justified in selecting a particular direction for his way, he cannot be prevented from so doing, merely because that direction involves a trespass upon the lands of third parties.[3] And the grantee of a "convenient wayleave" may not, as far as direction is concerned, be confined to such a way, as was convenient at the time the grant was made; if, at a subsequent time, a way in another direction is more convenient.[4] And, in all cases, the grantee, and not the grantor, of a "convenient" or "sufficient" wayleave is, *primâ facie*, the judge of the direction which will be convenient or sufficient.[5] However, if such a grantee makes a way in a particular direction, and immediately or very shortly afterwards abandons it, and makes a way in another direction, he may be made liable for the injury he thereby does the land. For, by his abandonment of the former way, he has shown that that way was unnecessary.[6] And the dominant owner may in all cases be made liable, if he acts *malâ fide*.[7]

(β) *Dimensions.*

Dimensions.

In *Proud* v. *Bates*,[8] (the facts of which have been already sufficiently stated[9]), the lessor chipped off to the height of a foot and a half a part of the soil, which lay above the excepted mines; and he claimed the right to use the way in its altered state. It was held, that he was entitled to do so.[10]

[1] See Richards *v.* Richards, Joh. 255: see also Wimbledon, &c., Cons. *v.* Dixon, 1 Ch. D. 370.

[2] See Dand *v.* Kingscote, 6 M. & W. 174, where the grantee twice traversed a highway: see p. 179.

[3] Dand *v.* Kingscote, *u. s.*, 199.

[4] *Ib.* 198.

[5] Abson *v.* Fenton, 1 B. & C. 195; Dand *v.* Kingscote, *u. s.*; Richards *v.* Richards, Joh. 255, 262, 263.

[6] Dand *v.* Kingscote, *u. s.*

[7] Richards *v.* Richards, *u. s.*, 263.

[8] 34 L. J. Ch. 406.

[9] *Ante*, p. 69.

[10] For statutory provisions as to the height and width of mining ways, see next page.

(γ) *Construction and Maintenance.*

Construction. Where the manner in which a way may be constructed, is not defined, it must be constructed in such a manner as a prudent person would have adopted, if he had been making the way over his own land, and not over the land of another.[1] And if the dominant owner judiciously designs and constructs the way, and takes no unnecessary ground, and does no unnecessary injury, he will be free from all liability.[2] But if, in making it, he does unnecessary injury to the land, as by making fences or ditches, which are not absolutely requisite, he will be liable.[3]

Maintenance. The dominant owner is bound to prevent the way from becoming a nuisance to the public, or to individuals.[4]

d. Public General Statutes.

Rail. Cl. Cons. Act. A landowner, whose land is compulsorily purchased by a railway company under the authority of the Rail. Cl. Cons. Act, 1845;[5] who possesses mines under the railway, or within the prescribed distance therefrom, which he is prevented from working by reason of apprehended injury thereto; and who possesses other adjoining mines which extend so as to lie on both sides of the railway; is entitled by the Act to make such communications through the intervening land between such other mines as may be requisite to enable him to work such other mines. But no such communication may be of greater dimensions or sections than those prescribed in the special Act, or (where no dimensions are prescribed) greater than eight feet wide, and eight feet high. Nor may the same be cut or made upon any part of the railway, or works, or so as to injure the same, or to impede the passage thereon. If any damage be sustained by the owner of the lands lying over the mines, the working whereof shall have been so prevented, by reason of the making of any such communication, the company are bound to make

[1] Abson *v.* Fenton, 1 B. & C. 195. Cf. Bishop *v.* North, 11 M. & W. 426.

[2] Dand *v.* Kingscote, 6 M. & W. 199. Cf. Bishop *v.* North, *u. s.*

[3] Dand *v.* Kingscote, *u. s.*

[4] See Bishop *v.* North, *u. s.*, *per* Parke. B.

[5] 8 & 9 Vict. c. 20.

him full compensation.[1] The Wat. Cl. Act[2] contains somewhat similar provisions.[3] Wat. Cl. Act.

The Land Tax Red. Act, 42 Geo. 3, c. 116, contains provisions reserving mining easements, where land containing mines is sold under the powers of the Act.[4] The Highways Acts, 3 Geo. 4, c. 126, and 5 & 6 Will. 4, c. 50, give rights of way for the carriage of materials for roads.[5] Rights of way for mining purposes may also be exercised under the Incl. Act, 22 & 23 Vict. c. 43;[6] by the Duke of Cornwall and his lessees under the Act 7 & 8 Vict. c. 105;[7] by the Crown and persons claiming under it under the Cornwall Subm. Mines Act, 1858;[8] by the Crown in respect of the foreshore, or the adjacent lands, under the Crown Lands Act, 1866;[9] and, in respect of lands in Ireland, under the Acts 23 & 24 Vict. c. 154, 33 & 34 Vict. c. 46, and 44 & 45 Vict. c. 49.[10] These several rights have been already mentioned.[11] Other statutory grants.

SECT. 3.—ROADWAYS—IMPLIED GRANT—WAY OF NECESSITY.

The doctrine as to a way of necessity has been thus stated :— "If I have a field enclosed by my own lands on all sides, and I alien this close to another, he shall have a way to this close over my land as incident to the grant: for otherwise he cannot have any benefit by the grant."[12] A way of necessity may be reserved, or rather re-granted, as well as granted, by implication.[13] And it may equally arise where the severance of the dominant and servient tenements is effected by an Act of Parliament giving compulsory powers, as where it is effected by a voluntary in- Way of necessity—surface way.

[1] Ss. 80, 82; cited *ante*, pp. 6, 7, n.
[2] 10 & 11 Vict. c. 17.
[3] S. 24.
[4] *Ante*, p. 146.
[5] *Ante*, pp. 104, 105, 106.
[6] *Ante*, pp. 276, 277.
[7] *Ante*, pp. 277, 278.
[8] *Ante*, p. 279.
[9] *Ante*, pp. 279, 280.
[10] *Ante*, pp. 280, 281. See preceding notes.

[12] See Rolle's Abr. tit. "Graunts," Z. p. 17; Simpson *v.* Tellwright, 2 Lutw. 519: see also Pinnington *v.* Galland, 9 Exch. 1; Proctor *v.* Hodgson, 10 *ib.* 824.

[13] See Pinnington *v.* Galland, *u. s.*; Wheeldon *v.* Burrows, 12 Ch. D. 31, 49, 57, 58, &c; London *v.* Riggs, 13 *ib.* 798. As to being re-granted, see *ante*, p. 355, n. [5].

strument.[1] Where, for instance, a railway had been compulsorily constructed through land; and the closes on either side contained minerals; and the owner constructed transversely across the railway another railway for the professed purpose of carrying minerals from one close to the other; it was held, that, if his railway was constructed for the necessary occupation of the closes, he was justified in constructing it.[2]

Sinking to reach and work minerals.

And the doctrine as to a way of necessity does not merely enable a mine-owner, who owns an overlying landlocked surface, to conduct over the surrounding land of his grantor or grantee the minerals which he brings to such surface. It enables a mine-owner, who would otherwise have no right to use the overlying land at all, to sink through such land from the surface to the mines in order to reach and work them.[3] And whether, if it be shown that the process of sinking will inevitably let loose a body of water within the overlying land, and thereby ruin it, it will be restrained,[4] it will certainly not be restrained, if the anticipated danger is shown to be visionary.[5] Of course, however, if the overlying land itself contains minerals, and a portion of those minerals is removed in the process of sinking, their owner will be entitled to them, or to an account of the proceeds.[6]

Limits of right.

A way of necessity cannot be claimed on the mere ground that a way, which had previously been in use, has become impassable. And, if it is claimed, it must be claimed *bonâ fide*. It cannot be claimed for a collateral purpose.[8] A way of necessity ought not to be of larger dimensions than are reasonably requisite.[9]

[1] Monmouth Canal Co. *v.* Harford, 1 Cr. M. & R. 614, 634.

[2] See *ib.*

[3] See Goold *v.* Gt. West. Coal Co. 2 De G. J. & S. 600. Cf. Rogers *v.* Taylor, 1 H. & N. 706.

[4] See *post*, Chap. XVII., Part C., Sect. 2, *a*, (β).

[5] See Goold *v.* Gt. West. Coal Co., *u.s.* 610, *et seq.*

[6] *Ib.* 608.

[7] Taylor *v.* Whitehead, Doug. 745: see also Wimbledon, &c., Cons. *v.* Dixon, 1 Ch. D. 370.

[8] Monmouth Canal Co. *v.* Harford, *u. s.*, 614.

[9] See *ib.* 634. A re-grant (as opposed to a grant) of a way of necessity is not commensurate with all the uses, for which the dominant tenement may be from time to time applied; but only with those, for which it might have been applied at the time of the re-grant (London *v.* Riggs, 13 Ch. D. 798). And the same rule probably applies to the case of a grant (*ib.*). See further, as to ways of necessity, Shelf. Real Prop. Stat. 75, *et seq.*; L. C. Conv. 177, *et seq.*

Sect. 4.—ROADWAYS—PRESCRIPTION.[1]

a. Kind of Way and its Application.

Generally.

The kind of way which may be used, and the purposes for which it may be applied, where a right of way arises by prescription, are two questions which may be considered together. An user by prescription of a right of way of a particular kind, or for a particular purpose, will not justify an user of a way of any other kind which is more onerous, or for any other purpose which is more onerous.[2] Whether it will necessarily justify an user of a way of any other kind not being more onerous, or for any other purpose not being more onerous, are questions which must be determined by reference to the cases.

Davies v. Stephens.

In *Davies* v. *Stephens*[3] it was laid down, that, where a right of carriage way was acquired by prescription, a right of footway was also necessarily acquired. In *Ballard* v. *Dyson*[4] it was held, that evidence of a prescriptive right of way for all manner of carriages did not necessarily prove a right of way for all manner of cattle, but that it was evidence of a drift way for the jury to consider with the other evidence. In *Cowling* v. *Higginson*,[5] a plea to a trespass set up a prescriptive right of way for horses, carts, waggons, and carriages. The plaintiff admitted, that there was this right, but for farming purposes only, and contended, that the right did not extend to mining purposes. Mines under the property had been opened, although they had not been worked for seventy years.[6] It was laid down, that, if the way were confined to a particular purpose, a jury ought not to extend it; but that, if it were proved to have been used for a variety of purposes, a jury might be warranted in finding a way for all purposes.[7] In *Dare* v. *Heathcote*,[8] it was held, that evidence of the user of a right of way for more than twenty years for all the purposes, for which the enjoyment of the

Ballard v. Dyson.

Cowling v. Higginson.

Dare v. Heathcote.

[1] See s. 2 of the Prescript. Act, cited *ante*, p. 314, n. [8].

[2] See Stafford *v.* Coyney, 7 B. & C. 257; Wimbledon, &c., Cons. *v.* Dixon, 1 Ch. D. 362.

[3] 7 C. & P. 570.

[4] 1 Taunt. 279.

[5] 4 M. & W. 245.

[6] See, as to this, Wimbledon, &c., Cons. *v.* Dixon, *u. s.*, 371.

[7] See 4 M. & W. 256, *per* Parke, B. Cf. Jackson *v.* Stacey, Holt's N. P. C. 457.

[8] 25 L. J. Exch. 245.

premises at different times required its exercise, was *primâ facie* evidence of a general prescriptive right for all purposes; although, for some of the purposes, it appeared, that the right was in fact first used within the twenty years. In *Wimbledon, &c., Conservators* v. *Dixon*,[1] a road had been immemorially used to a farm, not merely for usual agricultural purposes; but, in certain instances, for carrying building materials to enlarge the farmhouse and rebuild a cottage on the farm; and for carting away sand and gravel dug out of the farm. The defendant, who was the owner of the farm, claimed a right to use the way for carting the materials required for building a number of new houses upon the land; and *Cowling* v. *Higginson* and *Dare* v. *Heathcote* were referred to on his behalf. It was, however, held, that it was not intended in those cases to lay down a law, which would apply where the whole character of the dominant tenement was altered. The defendant might have been entitled to use the farm, *quâ* farm, for all purposes according to its ordinary and reasonable use. But he had no right to alter the whole character of the farm, and then use the way for the purposes of the property in its altered condition.[2]

Wimbledon &c. Cons. *v.* Dixon.

In *Bradburn* v. *Morris, Morris* v. *Bradburn*,[3] the claimant of a right of way proved, that for a period of twenty years the occupiers of the lands, in respect of which he claimed, had used an occupation road for agricultural purposes. It was held, that this was not of itself sufficient to prove a right to use the road for the purpose of getting minerals; no minerals having ever been got upon the lands in question.[4]

Bradburn *v.* Morris.

The result of these cases may be expressed in the following propositions:—

Result of the cases.

(1.) An user of a way of a particular kind, or for a particular purpose, will not justify an user of a way of any other kind which is more onerous, or for any other purpose which is more onerous.

(2.) An user of a way of a particular kind, or for a particular purpose, may justify an user of a way of another kind,

[1] 1 Ch. D. 362.

[2] See also Finch *v.* G. W. R. Co., 5 Exch. D. 258.

[3] 3 Ch. D. 812, 823.

[4] See also United Land Co. *v.* G. E. R. Co., 10 Ch. 590.

or for another purpose, where the latter user is necessarily and manifestly less onerous than, and implied in, the former; as where a claim to a right of footway is based upon a right of carriage-way.

(3.) A right of way can only be used according to the ordinary and reasonable use, to which the dominant tenement might have been applied at the time of the supposed grant; and an user of a right of a particular kind, or for a particular purpose, will not necessarily justify a subsequent substantial alteration of the burden upon the servient tenement.

(4.) Subject to the foregoing propositions, it is, in every case, in which the particular kind of way, which may be used, or the particular purpose, for which the way may be applied, has to be inferred from the actual user, a question of fact, under all the circumstances attendant upon the user, what the right is.[1]

b. Direction.

Direction.

It is, apparently, no objection to a claim to a right of way by prescription from one terminus to another, that the way has not been used in a perfectly definite track, but in varying lines.[2]

SECT. 5.—AIRWAYS.

No *primâ facie* right of ventilation.

Primâ facie, a man has no right to ventilate his mine through his neighbour's property.[3] And upon a grant or exception of mines, with liberty, express or implied, to ventilate the mines through the property of the grantor or grantee, the

[1] See Brunton *v.* Hall, 1 G. & D. 210 (n.), where the learned reporters state the conclusion to be drawn from the cases decided prior to the date of the report, and compare it with the civil law doctrine upon the subject. Cf. the law, where a right of way is conferred by express grant, *ante*, pp. 356 *et seq.*; 361 *et seq.*

[2] Wimbledon, &c., Cons. *v.* Dixon, 1 Ch. D. 362, *per* James and Mellish, L.JJ. In other respects there can be no difficulty as regards "direction." As regards "dimensions" and "construction" no difficulty can possibly arise. And as regards "maintenance," see *ante*, p. 370. In Dand *v.* Kingscote, 6 M. & W. 174, the validity of a plea of a customary right of way, which was set up, was not considered; but, apparently, only because sufficient evidence in support of the plea was not produced. As to extinguishment of rights of way, see L. C. Conv. 230 *et seq.*; Shelf. Real Prop. Stat., 81, 82, 83.

[3] See Powell *v.* Aikin, 4 K. & J. 356.

mine-owner is not, *primâ facie*, entitled so to ventilate an adjoining mine, of which he may also be the owner.[1]

Rail. Cl. Cons. Act.

A landowner, whose land is compulsorily purchased by a railway company, under the authority of the Rail. Cl. Cons. Act, 1845; who possesses mines under the railway, or within the prescribed distance therefrom, which he is prevented from working by reason of apprehended injury thereto; and who possesses other adjoining mines, which extend so as to lie upon both sides of the railway; has under the Act a similar right to make airways between such other mines through the intervening land for ventilating purposes, exercisable under similar limitations, and followed by similar consequences, to those already[2] noticed with respect to roadways.[3] And the Wat. Cl. Act contains somewhat similar provisions.[4]

Wat. Cl. Act.

Other statutory grants.

The Land Tax Red. Act, 42 Geo. 3, c. 116, contains provisions reserving mining easements, where land containing mines is sold under the powers of the Act.[5] Mining easements in respect of air may also be exercised under the Incl. Act, 22 & 23 Vict. c. 43;[6] and by the Duke of Cornwall and his lessees under the Act 7 & 8 Vict. c. 105.[7] These several rights have been already mentioned.[8]

Sect. 6.—Remedies.

a. Interference with Right.

Previously specified remedies—"injurious affection."

A mine-owner, on whose land a company have entered under compulsory powers, and who is "injuriously affected" by the execution of their works, may be entitled to receive compensation under s. 68 of the Lands Cl. Cons. Act, 1845.[9] The difficulties, which sometimes arise in estimating the amount of compensation, are illustrated in *Bidder* v. *North Staff. Rail. Co.*[10] There the plaintiffs were lessees under leases of different dura-

[1] See and consider Bowser *v.* Maclean, 2 De G. F. & J. 415; Proud *v.* Bates, 34 L. J. Ch. 406; Eardley *v.* Granville, 3 Ch. D. 826: in analogy to the rule in the case of a right of roadway, that where a right of roadway is granted for a specified purpose, the way cannot be used for a different purpose: see *ante*, p. 361.

[2] *Ante*, pp. 370, 371.

[3] See ss. 80, 82 of the Act, cited *ante*, pp. 6 n., 7 n.

[4] See 10 & 11 Vict. c. 17, s. 24.

[5] *Ante*, p. 146.

[6] *Ante*, pp. 276, 277.

[7] *Ante*, pp. 277, 278.

[8] See preceding notes.

[9] 8 & 9 Vict. c. 18.

[10] 4 Q. B. D. 412, 432.

tions of two adjoining mines. The company had, under their compulsory powers, taken a portion of the surface over the mine comprised in the longer lease; and had thereby cut off the direct access, which had previously existed between that mine and a neighbouring canal. A new access was possible. But it was more circuitous; and it was only obtainable by exercising a right, which the plaintiffs were entitled to exercise,[1] of going over the surface of the mine comprised in the shorter lease. In estimating the damage which the plaintiffs had sustained, it was held, (1) that a deduction should be made on account of the power to acquire the new access; but, (2) that the circuitousness of the new access, the shorter duration of the lease of the land over which it was obtainable, the damage which it would occasion to such land, and all other like matters, should be taken into consideration, and allowed for, in making the deduction. A mine-owner may also be entitled to compensation, where a portion of his mines is taken under compulsory powers, and his mining communications thereby severed.[2] But damages for severance cannot, of course, be obtained, where the portion taken does not actually contain within itself the mining communication.[3] Where a statutory remedy is specified, it should be pursued.[4]

Damages for severance.

Subject to the necessity in proper cases of pursuing specified remedies, an action for damages will lie for obstructing a right of roadway or airway.[5] And, although an action does not, in general, lie for a public nuisance, without special damage, yet, if a man is the owner of a colliery adjoining a public highway, and his coal carts are stopped on the highway, this is sufficient special damage to support an action.[6] The dominant owner may also, in general, have an injunction;[7] and, if necessary, a mandatory injunction.[8] However, in order to

Ordinary remedies—damages.

Injunction.

[1] See *ante*, pp. 364, 365.

[2] See, as to s. 81 Rail. Cl. Act, and s. 25 Wat. Cl. Act, *ante*, pp. 7, n.; 9.

[3] *Re* Huddersfield and Jacomb, 17 Eq. 476. As to what is included in the bond required to be given under s. 85 of the Lands Cl. Act, see *ante*, p. 347.

[4] See Thicknesse *v.* Lancaster Canal Co., 4 M. & W. 472.

[5] Bell *v.* Midland R. Co., 10 C. B. N. S. 287; Mold *v.* Wheatcroft, 27 Beav. 510, 521.

[6] Iveson *v.* Moore, 1 Ld. Raym. 486; 1 Salk. 15.

[7] Newmarch *v.* Brandling, 3 Swanst. 99; Bell *v.* Midland R. Co., 3 De G. & J. 673; Mold *v.* Wheatcroft, *u. s.* For the form of the injunction, see Mold *v.* Wheatcroft, *u. s.*

[8] See Bradburn *v.* Morris, Morris *v.* Bradburn, 3 Ch. D. 812, 820.

entitle the dominant owner to a remedy, he must have a present intention to use the way for mining purposes.[1]

b. Improper User.

(*a*) *Existence of Remedies.*

Damages.

If a man, who has no property in a piece of land, and who has no right of way over or through it for the carriage of his minerals or the ventilation of his mine, uses it for the carriage of his minerals or the ventilation of his mine, he may be made liable in damages.[2] And, if a man, although having a right of way over or through his neighbour's land for the carriage of his minerals or the ventilation of his mine, uses that land in an improper manner; whether as respects the kind of way which he uses;[3] or the direction which it takes;[4] or the purpose for which he applies it;[5] he may be made similarly liable. Or, in the latter case, the injured party may obtain compensation by way of wayleave or airleave rent upon all minerals gotten out of the wrongdoer's mine, which have been carried or ventilated through the land of the injured party.[6]

Wayleave or airleave rent.

Injunction.

The injured party will also, in general, be entitled to an injunction to restrain the future user.[7] And for this purpose

[1] Bradburn *v.* Morris, Morris *v.* Bradburn, 3 Ch. D. 812, 820.

[2] Monmouth Canal Co. *v.* Harford, 1 C. M. & R. 614. See also Martin *v.* Porter, 5 M. & W. 352, 353.

[3] Neath Canal Co. *v.* Ynisarwed Colliery Co., 10 Ch. 450.

[4] Senhouse *v.* Christian, 1 T. R. 560; Abson *v.* Fenton, 1 B. & C. 195; Dand *v.* Kingscote, 6 M. & W. 199.

[5] Howell *v.* King, 1 Mod. 190; Stafford *v.* Coyney, 7 B. & C. 257; Dand *v.* Kingscote, *u. s.*. 195; Midgley *v.* Richardson, 14 M. & W. 595.

[6] See Powell *v.* Aikin, 4 K. & J. 343; Hilton *v.* Woods, 4 Eq. 441, 442; Jegon *v.* Vivian, 6 Ch. 742; Phillips *v.* Homfray, *ib.* 770. For the form of an inquiry, which will be made with a view to providing such compensation, see Hilton *v.* Woods, Set. 206; Jegon *v.* Vivian, 6 Ch. 762, 763, Set. 205, 206; Phillips *v.* Homfray, 6 Ch. 776. In the latter case the L. C. refused (p. 781) on appeal, but chiefly on the ground of expense, to direct an inquiry as to ventilation. In Livingstone *v.* Rawyards Coal Co., 5 App. Cas. 25 (the facts of which are stated *post*, Chap. XXII., Sect. 2, c. (*a*)) it was intimated, that no compensation by way of way-leave rent could have been recovered: see p. 38, *per* Lord Hatherley; p. 43, *per* Lord Blackburn. In that case, however, no damage could have been shown by the carriage of the coals through the pursuer's land.

[7] Powell *v.* Aikin, *u. s.*; Wright *v.* Pitt, 12 Eq. 417; Phillips *v.* Homfray, *u.s.*; Wimbledon, &c., Cons. *v.* Dixon, 1 Ch. D. 362; Eardley *v.* Granville, 3 *ib.* 826, 832.

it is immaterial, that no special injury can be done him by a continuation of the user.[1] And if a man lays rails upon his neighbour's land for the purpose of carrying his minerals over them;[2] or makes an aperture in his neighbour's land for the purpose of carrying his minerals, or ventilating his mine, through it;[3] without having the right to do so; he may, in general, be compelled by mandatory injunction to remove the rails, or to stop the aperture up.[4] A man, who does not improperly make an aperture, but merely improperly uses one made by a previous wrongdoer, will not be ordered to himself stop it up, and to undergo the expense necessary for that purpose.[5] But he will be ordered to give access through his property to the injured party, to enable the latter to stop it up, and to carry all materials necessary for that purpose.[6]

(β) *Loss of Remedies.*

Death of wrongdoer.

The death of the wrongdoer may be a bar to the remedy; having regard to the maxim, *actio personalis moritur cum personâ*. Thus, in *Phillips* v. *Homfray*,[7] inquiries were directed with a view to compensate the plaintiffs by way of wayleave rent for the improper user of their property by the defendants. While the inquiries were being proceeded with one of the defendants died. It was held, that the inquiries should, as against the estate of that defendant, be stayed.[8]

[1] Powell *v.* Aikin, 4 K. & J. 343; Eardley *v.* Granville, 3 Ch. D. 826, 832. Cf. Goodson *v.* Richardson, 9 Ch. 221.

[2] Neath, &c., Co. *v.* Ynisarwed, &c. Co., 10 Ch. 450.

[3] Powell *v.* Aikin, *u. s.*

[4] For the form of an order restraining transport and ventilation, see Hilton *v.* Woods, Set. 206. For the form of an injunction to restrain the making or using, or allowing to remain, any road or way, for the purpose of conveying minerals, see Eardley *v.* Granville, Set. 204: see also Baynton *v.* Leonard, *ib.* 203; Bell *v.* Joell, *ib.* For the form of an injunction to restrain the laying, or the permitting to remain, rails, tram-plates, sleepers, and other articles on the plaintiff's land, see Neath, &c., Co. *v.* Ynisarwed, &c., Co., *ib.* 196. And for the form of an interlocutory injunction to restrain the construction of a railway or tramway for mineral purposes, see Holden *v.* Hargreaves, *ib.* 204, 205.

[5] See Powell *v.* Aikin, *u. s.*, 343, 357.

[6] *Ib.* For the form of the order, see p. 360.

[7] 6 Ch. 770 : see *ante*, p. 378, n. [6].

[8] See W. N. 1883, p. 132, *per* Cotton and Bowen, L.JJ., Baggallay, L. J., dissenting; reversing, on this point, the decision of Pearson, J., as reported in 52 L. J. Ch. 401.

CHAPTER XVII.

NEIGHBOURS—WATER.

PART A.—USING AND ABSTRACTING WATER.[1]

SECT. 1.—WATER FLOWING NATURALLY—DEFINED COURSE.

a. Surface Water—Generally.

Meaning of natural surface water flowing in defined course.

IT has been said, that, to constitute a stream of natural surface water flowing in a defined course, the flow must possess that continuous unity of character by which the flow on one person's land can be identified with that on his neighbour's; and that water which squanders itself over an indefinite surface cannot constitute such a stream.[2] Water which flows in a defined course has also been spoken of as water once confined in a regular channel;[3] and as water which is capable of diversion.[4]

Ennor *v.* Barwell.

It is often, however, difficult to apply these descriptions to particular facts. Thus, in *Ennor* v. *Barwell*,[5] the plaintiff complained of the diversion by the defendant of two different streams of water, which otherwise would have found their way to the plaintiff's mine, and have been utilised by him. The water of the first stream, which was supplied by accumulation and percolation, afforded a continuous supply to surface springs; and it flowed, sometimes in abundance, at other times in a scanty degree, from these springs in a natural course into the plaintiff's

[1] As to the right of support for land naturally covered by water, see *ante*, p. 298. As to the right of support for land artificially covered by water, see *ib.* And as to the right of support by water, see *ante*, pp. 348, *et seq.*

[2] See Briscoe *v.* Drought, 11 Ir. C. L. Rep. 250, 271, 273, *per* Christian, J.

[3] Grand Junction Canal *v.* Shugar, 6 Ch. 487, *per* Lord Hatherley.

[4] Taylor *v.* St. Helens, 6 Ch. D. 273, *per* Jessel, M. R.

[5] 2 Giff. 410, 422 *et seq.*

mine. From the nature and situation of the surface springs the course of the flow was not very deeply furrowed or accurately defined; but the water could not, at the same time, have been described as water casually falling and occasionally diffused along the surface. The second stream of water rose to the surface in a place so close to the boundary of the plaintiff's mine, that there was not, in fact, sufficient distance to admit of a regular or defined channel being furrowed; but the supply was, at the same time, both copious and continuous.[1] In respect of both these streams it was held, that the flow was defined.[2]

Artificial watercourse sometimes on same footing as natural.

The mere fact of a natural watercourse flowing in an artificial channel does not make it the less a natural watercourse.[3] And an artificial watercourse after it has been united to a natural watercourse is considered to have lost its artificial character. For it is impossible to draw any difference between rights in a natural stream in its original state, and rights in a natural stream after it receives accessions from artificial sources.[4]

b. Surface Water—Natural Rights.

(*a*) *Riparian Owner.*

General rights of riparian owner—Miner *v.* Gilmour.

The law on this subject has been thus stated:—"By the general law applicable to running streams every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes, and for his cattle; and this, without regard to the effect, which such use may have in case of a deficiency upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it; provided he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition,

[1] It was held on appeal (4 L. T., N. S. 597) that the evidence as to the above-mentioned facts was too conflicting and unsatisfactory to justify a decision, and a trial at law was directed.

[2] Cf. Rawstron *v.* Taylor, 11 Exch. 369, 382; Broadbent *v.* Ramsbotham, *ib.* 602.

[3] See Nuttall *v.* Bracewell, L. R. 2 Exch. 14; Holker *v.* Poritt, 8 *ib.* 115. "It may be that an entirely artificial stream, as one flowing from a mine, for instance, would be different," *ib.* See, upon this subject, *infra*, Sect. 3.

[4] See Wood *v.* Waud, 3 Exch. 779, *per* Pollock, C. B.

he may dam up a stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury."[1] The right in question is *ex jure naturæ*. It does not rest upon presumed grant from long acquiescence on the part of the proprietors above and below. For it is impossible that such proprietors could prevent its acquisition.[2] Where rights exist in respect of water, they can, apparently, be only exercised for purposes of utility, and not wilfully or negligently.[3]

Rights only exercisable for purposes of utility.

Illustrations.

A riparian owner may, accordingly, use the stream for the purpose of working machinery connected with his mines, or as a means of transport for his minerals, or otherwise use the stream in a reasonable degree; or abstract or divert it in reasonable quantities.[4] But he may not, *primâ facie*, in undermining, tap the bed of the stream and draw off all the water;[5] or by any other act sensibly interfere with the common enjoyment.[6]

Remedies for interference—Damages.

Injunction.

If a man's natural right to use or abstract water flowing in a defined course is infringed, he may recover damages.[7] He is also in general entitled to an injunction to restrain the continuance of the injury.[8] And his right to an injunction is

[1] Miner *v.* Gilmour, 12 Moo. P. C. 156, *per* Lord Kingsdown. See also Acton *v.* Blundell, 12 M. & W. 349, 350; Wood *v.* Waud, 3 Exch. 748; Chasemore *v.* Richards, 2 H. & N. 181, 7 H. L. Cas. 349, 374, 379, 382; Ennor *v.* Barwell, 2 Giff. 424 *et seq.*; Gaved *v.* Martyn, 19 C. B. N. S. 732, 759. There are numerous other authorities to the same effect, most of which are cited in Sandwich *v.* G. N. R. Co., 10 Ch. D. 707; Rameshur, &c. *v.* Koonj, 4 App. Cas. 121; and Ormerod *v.* Todmorden, &c., Co., 11 Q. B. D. 155.

[2] See Dickinson *v.* Grand Junction Co., 7 Exch. 299; Rawstron *v.* Taylor, 11 *ib.* 382; Chasemore *v.* Richards, 7 H. L. Cas. 368, 370, 382, 384, 385, 386; overruling the *dicta* to the contrary in Acton *v.* Blundell, *u. s.*, 324, 350; and Smith *v.* Kenrick, 7 C. B. 546.

[3] See Acton *v.* Blundell, *u. s.*, 324; Chasemore *v.* Richards, 7 H. L. C. 388; and cf. Smith *v.* Kenrick, *u. s.*, 515; Rylands *v.* Fletcher, L. R. 3 H. L. 330; Smith *v.* Fletcher, L. R. 9 Exch. 67; Crompton *v.* Lea, 19 Eq. 127, 129. The civil law doctrine is analogous.

[4] See Weeks *v.* Haward, 10 W. R. 557; Sandwich *v.* G. N. R. Co., *u. s.*, 707; Ormerod *v.* Todmorden, &c., Co., *u. s.*, 155, 168, 172.

[5] See Crompton *v.* Lea, *u. s.*, 127, 128.

[6] See Ennor *v.* Barwell, *u. s.*, 424, *et seq.* As to what will constitute a sensible interference, see Wood *v.* Waud, *u. s.*

[7] Bastard *v.* Smith, 2 M. & Rob. 129.

[8] Ennor *v.* Barwell, *u. s.*, 410. See also Grand Junction Canal *v.* Shugar, 6 Ch. 483.

independent of whether he can prove actual damage. His right, in this respect, was always recognized in cases, where the wrongdoer claimed the right to use the water in the manner complained of;[1] on the ground, that, if the claim were acquiesced in for twenty years, it would be acquired as an easement.[2] And it seems formerly to have been confined to such cases. Now, however, in other cases, where only nominal damages are recoverable, the right is nevertheless recognized on the ground, that the injured party might otherwise be obliged to bring repeated and successive actions for damages.[3] A defendant, whose mining operations had caused the level of the bed of a stream to sink to the extent of four feet, was obliged to undertake not to work, so as to obstruct the supply of water along the stream; although no actual diminution of water was proved.[4]

Inspection

A litigant, who has a *primâ facie* case, may usually obtain, on interlocutory application, an order giving himself and his agents liberty to inspect his neighbour's property, for the purpose of ascertaining, whether his water rights have been infringed;[5] and, as ancillary to such liberty, liberty to make sections, plans, or models.[6] He will usually, however, have to submit to terms. He will usually be obliged to give a reasonable notice; stating the time at which he proposes that the inspection shall take place, and the names of the persons whom he proposes as his agents for that purpose. He will usually

[1] Elwell *v.* Crowther, 31 Beav. 163; Wilts, &c. Co. *v.* Swindon, &c. Co., 9 Ch. 451; affirmed with variations, *nom.* Swindon, &c., Co. *v.* Wilts, &c., Co., L. R. 7 H. L. 697, 705, 706. The same principle was recognised in Wood *v.* Sutcliffe, 2 Sim. N. S. 163; the plaintiff in that case having disentitled himself to an injunction only because of his acquiescence.

[2] Swindon, &c., Co. *v.* Wilts, &c., Co., *u. s.*, 705.

[3] See Pennington *v.* Brinsop Hall Coal Co., 5 Ch. D. 773, 774, *per* Fry, J.

[4] Elwell *v.* Crowther, *u. s.* As to interfering with the alveus of a stream, see Bickett *v.* Morris, L. R. 1 Sc. & D. 47; Orr-Ewing *v.* Colquhoun, 2 App. Cas. 839. Sometimes, where water rights are infringed, a mandatory injunction will be directed: see Harrop *v.* Hirst, Set. 213. For the form of an injunction against diverting or diminishing a flow of water, see Ennor *v.* Barwell, 2 Giff. 427, 428; Set. 213. And for the form of a declaration of right, and of a mandatory injunction to restore a flow of water, and of an inquiry as to damages for the interference, see Harrop *v.* Hirst, *u. s.*

[5] See Ennor *v.* Barwell, 1 De G. F. & J. 529. Cf. *post*, Chap. XXII. Sect. 2, *f.* Cf. as to support, *ante*, p. 353.

[6] See Ennor *v.* Barwell, 1 De G. F. & J. 530.

have to make good all damage which his neighbour may sustain. And he will not be allowed to make trenches, or remove earth, or cut down embankments, in, or otherwise break up, his neighbour's soil.[1]

(β) *Non-riparian Owner.*

Rights of non-riparian owner.

If a mine-owner is not a riparian owner, he cannot obtain from a riparian owner a grant of the use of the water for mining purposes, which will be good as against other riparian owners. In other words, an effectual grant in gross of water rights cannot be made.[2]

c. *Surface Water—Acquired Rights.*

Larger rights may be acquired by grant, voluntary or statutory.

A man may by grant, express or implied, acquire, to the prejudice of the natural rights of his neighbours, the right to use, or to abstract or divert, natural surface water flowing in a defined course.[3] Thus, if the riparian owners of a natural watercourse grant the control of it to one of their number, the grantee may prevent the grantors from abstracting any portion whatever of the water; or he may himself use, or abstract or divert, it at pleasure.[4] And similar rights may be acquired by statute. Thus, the course of streams may be altered

[1] See Ennor *v.* Barwell, 1 De G. F. & J. 529, 530, 531, 532; varying on appeal an order of V.-C. Stuart. For forms of orders to inspect, see *post*, Chap. XXII., Sect. 2, *f*.

[2] See Stockport Co. *v.* Potter, 3 H. & C. 300; Nuttall *v.* Bracewell, L. R. 2 Exch. 1; Ormerod *v.* Todmorden, &c., Co., 11 Q. B. D. 155. The point was left undecided in Insole *v.* James, 1 H. & N. 243. See to the contrary the judgments of Bramwell, B., in Stockport Co. *v.* Potter, *u. s.*; and Nuttall *v.* Bracewell, *u. s.* However, if a non-riparian owner, by agreement with a riparian, cuts a goit from one point to another within the latter's boundary, and thereby conducts a portion of the stream, returning it at the lower point, he may, if riparian owner of the goit, possess, in respect thereof, all the rights of a riparian owner as against the riparian owners of the stream above the point of diversion: Stockport Co. *v.* Potter, *u. s.*; Nuttall *v.* Bracewell, *u. s.*; Holker *v.* Poritt, L. R. 8 Exch. 107; affirmed 10 *ib.* 59; Ormerod *v.* Todmorden, &c., Co., *u. s.*, 155, 168. Cf. Whaley *v.* Laing, 2 H. & N. 476, 486.

[3] See Weeks *v.* Haward, 10 W. R. 557; Gaved *v.* Martyn, 19 C. B. N. S. 759. As to the necessity, at law, of a deed, see Nuttall *v.* Bracewell, *u. s.*, 10.

[4] See and consider Northam *v.* Hurley, 1 E. & B. 665 (observed upon in Whitehead *v.* Parks, 2 H. & N. 870). Cf. Wood *v.* Waud, 3 Exch. 748, 772; Mason *v.* Shrewsbury, &c., R. Co., L. R. 6 Q. B. 578.

for mining purposes under the Incl. Act, 22 & 23 Vict. c. 43.[1] So, the Duke of Cornwall, and persons acting under his authority, may take, use, and divert water for mining purposes under the Act 7 & 8 Vict. c. 105.[2] So streams may be diverted and used for mining purposes under the Irish Act, 46 Geo. 3, c. 71.[3] And streams may be employed for mining purposes under the Irish Act, 23 & 24 Vict. c. 154.[4] Where rights in a stream of natural surface water flowing in a defined course are claimed under a grant, the watercourse cannot, *primâ facie*, be used in a manner different from that in which it was used prior to the date of the grant, or in a manner unauthorised by the instrument of grant.[5]

Or by prescription.

A right, to the prejudice of the natural rights of one's neighbours, to use, or abstract or divert, natural surface water flowing in a defined course may also be acquired by prescription. And such acquisition may be had either at common law,[6] or under the Prescription Act.[7] If a higher riparian owner acquires as an easement a right to pen back water, a right to the flow of a part of the water so penned back may be acquired against him by a lower riparian owner as an easement by prescription.[8] In order to enable water rights to be acquired under the Act, the person claiming them must show enjoyment as of right for the full period of twenty years. And if an interruption in the enjoyment be acquiesced in for more than a year before any proceedings are taken, a claim under the Act cannot be maintained.[9]

Or by custom.

And a similar right may sometimes be acquired by custom. Thus, according to the custom of Cornwall, all tin bounders are entitled to divert water within their bounds for the purposes of their mines.[10] However, the stanners of Devon are not entitled by custom to divert water from streams into

[1] See *ante*, p. 277.
[2] See *ante*, pp. 277, 278.
[3] *Ante*, p. 280.
[4] *Ib.*
[5] See Insole *v.* James, 1 H. & N. 243. Cf. the law as to rights of way, *ante*, pp. 357, 361.
[6] Bealey *v.* Shaw, 6 East, 214, 215; Chasemore *v.* Richards, 2 H. & N. 182.
[7] Gaved *v.* Martyn, 19 C. B. N. S. 759; Pennington *v.* Brinsop Hall Co., 5 Ch. D. 769. See s. 2 of the Act cited *ante*, p. 314, n.[8].
[8] See Ennor *v.* Barwell, 2 Giff. 410, 419, 420, 421.
[9] Ennor *v.* Barwell, *u. s.*
[10] See Rogers *v.* Brenton, 10 Q. B. 65; Gaved *v.* Martyn, *u. s.*, 732. See *post*, Chap. XVIII. Sect. 3, *d.*

their mines, and for that purpose to dig trenches over other persons' lands.[1]

Remedies for interference.

If a man's acquired rights in water flowing naturally and in a defined course are infringed, he may recover damages and have an injunction.[2] And it is not necessary to show special damage in order to recover for the diversion of a natural water-course, in respect of which rights have been acquired by grant or prescription.[3]

d. Subterranean Water.

Subterranean water.

It is sufficient to say upon this subject that, as far as is possible from the nature of the case, the same principles apply as those which apply in the case of surface water flowing naturally in a defined course.[4]

SECT. 2.—WATER FLOWING NATURALLY—UNDEFINED COURSE—PERCOLATIONS.

a. Undefined Course.

Water in undefined course may, *primâ facie*, be abstracted or diverted at pleasure.

Very different considerations apply, where the water, whether surface or subterranean, "comes no one knows exactly whence, and flows no one knows exactly how; which is unconfined in any channel, either as rainfall or from springs of the earth; which may vary from day to day, or spring up beneath the surface in a direction which no one knows."[5] If water flows in its natural course, whether surface or subterranean, but does not flow in a defined channel, any person through whose property it flows may, *primâ facie*, abstract or divert it at pleasure.[6] A

[1] Bastard *v.* Smith, 2 M. & Rob. 129. As to a customary right in non-riparian owners to use the water of a stream, see Harrop *v.* Hirst, L. R. 4 Exch. 43.

[2] See Pennington *v.* Brinsop Hall Co., 5 Ch. D. 774.

[3] See Northam *v.* Hurley, 1 E. & B. 665; Rawstron *v.* Taylor, 11 Exch. 369. As to inspection, see *ante*, pp. 383, 384.

[4] See Dickinson *v.* Grand Junction Canal Co., 7 Exch. 300, 301; Dudden *v.* Clutton, 1 H. & N. 630; *per* Pollock, C. B.; Broadbent *v.* Ramsbotham, 11 Exch. 615, *per* Alderson, B.; Chasemore *v.* Richards, 7 H. L. C. 374, 384, *per* Lords Chelmsford and Wensleydale.

[5] See Grand Junction Canal Co. *v.* Shugar, 6 Ch. 487, *per* Lord Hatherley.

[6] Acton *v.* Blundell, 12 M. & W. 350; Rawstron *v.* Taylor, 11 Exch. 369, 382; Broadbent *v.* Ramsbotham, *ib.* 615, 617; Chasemore *v.* Richards, 7 H. L. C. 349, 370, 371, 378; overruling Balston *v.* Bensted, 1 Camp. 463; and Dickin-

man may, however, acquire by way of easement the right to prevent his neighbour from abstracting or diverting water which does not flow in a defined course.[1] And, if his acquired right is infringed, he may recover damages.[2]

b. Percolations—Natural Rights.

A fortiori percolating water.

The principles applicable to water, the presence of which is due to natural causes; but which does not in fact flow, but merely percolates through the soil; follow *à fortiori* from those applicable to water, which, although flowing naturally, does not flow in a defined course. Thus, in *Chasemore v. Richards*,[3] a landowner and millowner had for above sixty years[4] enjoyed the use of a stream, which was chiefly supplied by percolating underground water. An adjoining owner dug on his own ground for the purpose of supplying water to the inhabitants of a district, many of whom had no title as landowners to the use of the water. The underground water was in consequence drained away; and the millowner lost the use of the stream. It was held, that he had no right of action.[5] It would have been impossible to reconcile such a right with the natural and ordinary rights of landowners; or to fix any reasonable limits to its exercise.[6]

Chasemore *v.* Richards.

Acton *v.* Blundell.

And not merely is a man free from liability, who drains away percolating water, which would otherwise have found its way into his neighbour's property. He is equally free from liability,

son *v.* Grand Junction Canal Co., 7 Exch. 282. See also Ennor *v.* Barwell, 2 Giff. 410, 422. As to what constitutes water flowing in a defined channel, see *ante*, pp. 380, 381.

[1] See Whitehead *v.* Parks, 2 H. & N. 870.

[2] *Ib.*

[3] 7 H. L. C. 349.

[4] This made no difference, as the right could not have arisen by a presumed grant. See pp. 370, 385; *ante*, p. 382.

[5] Affirming S. C., 2 H. & N. 168. See also Scots Mines Co. *v.* Leadhills Mines Co., 34 L. T. 34; R. *v.* Metropolitan Board of Works, 3 B. & S. 710; and cf. New River Co. *v.* Johnson, 2 E. & E. 435. In the latter case it was held, that a person, who sustained damage from the execution of works authorised by statute, was not entitled to compensation under the compensation clauses of the statute; the damage having been such, that, if the works had not been authorised by statute, the claimant would not, according to Chasemore *v.* Richards, have had any right of action.

[6] Chasemore *v.* Richards, 7 H. L. C. 371.

if, as the result of his operations, percolating water ceases to be retained in his neighbour's property. Thus, in *Acton* v. *Blundell*,[1] it was held, that the owner of land through which water flows in a subterraneous course, has no right or interest in it, which will enable him to maintain an action against his neighbour, who in carrying on mining operations in his own land in the usual manner, drains away the water from the land of the former, and lays his well dry. If the law were otherwise, the advantage on one side and the detriment on the other would bear no proportion whatever. And there would be no limit of space within which the claim of right could be confined.[2]

Ballacorkish, &c., Co. *v.* Harrison.

So also in *Ballacorkish, &c., Co.* v. *Harrison*.[3] There the holders of a mining lease caused water, which would otherwise have flowed into, or been retained in, wells and springs in the superjacent land, to be withdrawn by percolation into their mine. The property was situate in the Isle of Man; and the lessees held under the Crown, in whom the freehold in the mines was vested. The owners of the superjacent lands became such under a statutory severance of the titles; and they had used the wells and springs for farm purposes. It was held that they were not entitled to any remedy against the lessees of the mines. It was observed, that the relative positions of the surface owners and the mine owners could not be different from those of two horizontally adjacent owners who were always strangers in title;[4] and that one of two horizontally adjacent owners would not have been liable for laying his neighbour's well dry.[5]

[1] 12 M. & W. 324.

[2] See p. 351. See also New River Co. *v.* Johnson, 2 E. & E. 435; Grand Junction Canal *v.* Shugar, 6 Ch. 487; West Cumberland, &c., Co. *v.* Kenyon, 6 Ch. D. 780, 781; Hurdman *v.* N. E. R. Co., 3 C. P. D. 174, 175: and cf. the Sc. decision of Blair *v.* Hunter, 9 Sess. Cas. (3rd ser.) 204. It is immaterial, whether the well is ancient or not. It was queried in Hammond *v.* Hall (10 Sim. 551), and in Acton *v.* Blundell (12 M. & W. 324), whether, if a well had been ancient, its owner would, under the circumstances stated in the text, have had a remedy. This question was, however, in effect answered in the negative in Chasemore *v.* Richards, 7 H. L. C. 349: *ante*, p. 382.

[3] L. R. 5 P. C. 49: nom. Ballacorkish, &c., Co. *v.* Dumbell, 43 L. J. P. C. 19.

[4] On the principle, that, where mines are excepted in an instrument of severance, the dominion of the mine owner in respect of the chamber which incloses the minerals is complete: *ante*, pp. 67, 68.

[5] See Acton *v.* Blundell, 12 M. & W. 324; *supra*. It was also contended

However, where rights exist in respect of water, they can, apparently, be only exercised for purposes of utility, and not wilfully or negligently.[1] But rights only exercisable for purposes of utility.

c. *Percolations—Acquired Rights.*

A man may acquire by way of grant the right to prevent his neighbour from abstracting or diverting water which percolates or oozes through the soil. Thus in *Whitehead* v. *Parks*[2] there was a demise of a dwelling-house and fifteen pieces of land, and a grant of all streams of water which lay under four of such pieces, naming them. There was an exception out of the demise of all mines, &c., and of all streams of water except those expressly granted; with power for the lessor to enter and work. There was only one stream of water upon the surface of the demised premises, and this was surrounded by the above-mentioned four pieces of land; but there were certain wells in those pieces of land. The lessor in working his mines cut off the wells. It was held, that the wells had passed by the grant; and that the lessor was, accordingly, liable.[3] If a man's rights in percolating water are infringed, he may of course recover damages.[4] *Primâ facie* rights may be affected by grant. Damages for interference.

A man's *primâ facie* freedom from liability in respect of percolating water cannot, it would seem, be altered by prescription.[5] And, whether a right founded on custom to obtain com- Prescription and custom.

that, according to the custom of the Isle of Man, (as to which, see *post*, Chap. XXI., Sect. 2, (a)) compensation was payable for the damage done by the percolation; but no such custom was proved to exist. Although a mine owner is, *primâ facie*, not liable for abstracting or diverting water which merely percolates through the soil, he must not, in interfering with such water, interfere also with water which flows in a defined course: Grand Junction Canal *v.* Shugar, 6 Ch. 483.

[1] See Scots Mines Co. *v.* Leadhills Mines Co., 34 L. T. 34: see also Chasemore *v.* Richards, 7 H. L. C. 388, where Lord Wensleydale said that the Act must be done reasonably. See also Acton *v.* Blundell, 12 M. & W. 336, where the analogous civil law doctrine was referred to, and where the mining operations were admitted to have been carried on in the usual manner; and cf. *ante*, p. 382, n. [3], and cases there cited.

[2] 2 H. & N. 870.

[3] Cf. Ballacorkish, &c., Co. *v.* Harrison, L. R. 5 P. C. 60, 62; Taylor *v.* St. Helens, 6 Ch. D. 273.

[4] See Whitehead *v.* Parks, 2 H. & N. 870.

[5] It is hard to see how the right in question could be acquired as of right. Balston *v.* Bensted, 1 Camp. 463, to the contrary, has been overruled: see *ante*, p. 386, n. [6].

pensation for the damage caused by the diversion of percolating water can be sustained, is, it seems, doubtful.[1]

Sect. 3.—Water flowing in artificial channel.

a. Natural Rights.

Water flowing in artificial channel may, *primâ facie*, be abstracted or diverted at pleasure.

Where the presence of water is due to artificial causes,[2] any person, in or through whose property it flows, may, *primâ facie*, abstract or divert it at pleasure, without incurring any liability.[3] But, of course, no such right can be exercised, *primâ facie*, by a stranger.[4] Whether an action against a stranger for usurping such a right would lie at the suit of a person, who, under a mere permission from the owner of an artificial watercourse, conducts water therefrom to his land, is a question, which has been mooted, but not decided.[5]

b. Acquired Rights.

(*a*) *Grant.*

Primâ facie rights may be affected by grant.

Rights to the prejudice of the natural rights of other persons may be acquired by express grant in water, the presence of which is due to artificial causes.[6] But, if the grant is made subject to specified conditions, the conditions must be strictly complied with.[7] Similar rights may, where one of two adjoining

[1] See Ballacorkish Co. *v.* Harrison, L. R. 5 P. C. 64, 65. See *post*, Chap. XXI., Sect. 2, (*a*).

[2] It has been already seen, that an artificial watercourse, after it has been united to a natural watercourse, is considered to have lost its artificial character; see *ante*, p. 381.

[3] See Arkwright *v.* Gell, 5 M. & W. 203; Wood *v.* Waud, 3 Exch. 748; Rawstron *v.* Taylor, 11 *ib.* 382; Gaved *v.* Martyn, 19 C. B. N. S. 759; Rameshur *v.* Koonj, 4 App. Cas. 121, 126.

[4] See Magor *v.* Chadwick, 11 A. & E. 571, 586; Wood *v.* Waud, *u. s.*; Whaley *v.* Laing, 2 H. & N. 476; nom. Laing *v.* Whaley, 3 *ib.* 675.

[5] See Whaley *v.* Laing, *u. s.*, 486.

[6] See Rawstron *v.* Taylor, 11 Exch. 369; Gaved *v.* Martyn, 19 C. B. N. S. 759; Taylor *v.* St. Helens, 6 Ch. D. 264; Rameshur, &c., *v.* Koonj, &c., 4 App. Cas. 121, 126. Cf. Birmingham Canal Co. *v.* Lloyd, 18 Ves. 515. A grant of a watercourse means, *primâ facie*, a grant of the easement, and not of the land over which the water flows: see Taylor *v.* St. Helens, *u. s.*

[7] See Finch *v.* Birmingham Canal Nav., 5 B. & C. 820, a case dealing with statutory rights in water raised from mines.

tenements has been sold by the person who was formerly the owner of both, be acquired by implied grant or reservation.[1]

(β) *Prescription.*

Or by prescription.

And it is clear, that, in many cases, rights may be acquired by prescription in respect of an artificial watercourse similar to those which riparian owners enjoy *ex jure naturæ* in respect of a natural watercourse.[2] Thus, in *Beeston* v. *Weate*,[3] it was proved, that the watercourse in question was artificial, but that the plaintiff and his predecessors in title had from immemorial time enjoyed the use of it as of right. It was held that the defendant was liable for diverting it.[4]

Ivimey v. Stocker.

So in *Ivimey* v. *Stocker*.[5] There a mine had from before the time of living memory been worked by tin bounders according to the custom of Cornwall.[6] The bounders had from before the time of living memory used for the purposes of their works the water of an artificial water-course, which arose in the land of another person. The bounders abandoned the mine nine years before the action was commenced, and since that time the owners had been in possession. It was held, that the owners had acquired by prescription a right to the use of the water; and that the owner of the land in which the water rose was not, therefore, entitled to divert it.[7]

Gaved v. Martyn.

And the mere contingent rights of third parties to divert water are not of themselves sufficient to prevent a person from acquiring by prescription a right to the use of an artificial watercourse. Thus in *Gaved* v. *Martyn*,[8] a flow of water[9]

[1] Rameshur, &c., *v.* Koonj, &c., 4 App. Cas. 128, 129. Cf., as to support, *ante*, p. 310.

[2] It was formerly supposed that no such rights could be acquired, however ancient the watercourse might be, and in whatever degree, and by however numerous a class of persons, enjoyed: see Magor *v.* Chadwick, 11 A. & E. 586.

[3] 5 E. & B. 986.

[4] See also Ivimey *v.* Stocker, 1 Ch. 396, 406.

[5] 1 Ch. 396.

[6] See *post*, Chap. XVIII., Sect. 3.

[7] Reversing s. c. 2 Dr. & Sm. 537; where it was held, that the interests of the bounders were an impediment in the way of and adverse to the rights of the owners; and that they could not, therefore, be regarded as the predecessors in estate of the owners. See further, as to this case, *post*, Chap. XVIII., Sect. 3, *d*.

[8] 19 C. B. N. S. 732.

[9] The "lower launder" referred to in the case. As to the "upper launder," see *post*, p. 394, n. [5].

was procured by the plaintiff's predecessor in title driving an adit into land which was subject to the rights of tin bounders.[1] The flow was intended to be permanent; and it was enjoyed by the plaintiff and his predecessors without interruption for more than twenty years. The defendant diverted the water. It was held, that the existence of rights in the bounders, which they had not chosen to exercise, did not deprive the plaintiff of the remedy which he would otherwise have had.[2] And it is not necessary that the person claiming the right should be a freeholder. A mere occupier of land, through which water flows in an artificial course, such as a lessee or licensee, has a sufficient interest in the soil to entitle him, after an enjoyment for twenty years, to maintain an action for diversion.[3] And, of course, his right is none the less, because he also happens to have the right of searching for minerals in land not in his occupation.[4]

But there must be an enjoyment as of right.

The easement must, however, if claimed by prescription, be, as in all other cases, enjoyed as of right, and neither *vi, clam,* nor *precario.* If, therefore, a flow of water has its origin in a man discharging it from his property for his own convenience; and it thence flows, either in an artificial channel, or in a channel of its own formation; the enjoyment of it will be considered to be precarious; and no rights in respect of it can be acquired as against him by prescription either at common law or under the Prescription Act.

Arkwright *v.* Gell.

Thus in *Arkwright* v. *Gell,*[5] a company of proprietors in the early part of the last century, and by an agreement with the mine owners,[6] constructed a sough or drain for the purpose of draining certain mineral fields. The water from this sough flowed into a brook. In 1771 the plaintiff's predecessor in title became the lessee of the brook, of the stream issuing from the sough, and of a piece of land below the junction

[1] See *post*, Chap. XVIII., Sect. 3.

[2] See also Arkwright *v.* Gell, 5 M. & W. 203; Magor *v.* Chadwick, 11 A. & E. 571; Wood *v.* Waud, 3 Exch. 748; Whaley *v.* Laing, 2 H. & N. 476; nom. Laing *v.* Whaley, 3 *ib.* 675; Sutcliffe *v.* Booth, 32 L. J. Q. B. 136; Rameshur, &c. *v.* Koonj, &c., 4 App. Cas. 121, 126. Cf. Falmouth *v.* Innys, Mosely, 92.

[3] See Gaved *v.* Martyn, 19 C. B. N. S. 732, 752.

[4] *Ib., per* Willes, J.

[5] 5 M. & W. 203.

[6] Such agreements have long been customary in Derbyshire, where the mines in question were situate, and in fact form part of the Derbyshire Custom: see *post*, Chap. XXI., Sect. 1, *f.*

of the sough with the brook. He shortly afterwards erected cotton mills on this piece of land; and these cotton mills were turned by the united waters of the sough and the brook. In 1789 he became the owner in fee of those properties, and also of the land through which the sough was made. Meanwhile, in 1771 another company of proprietors, whom the defendants represented, by another agreement with the mine owners, commenced the erection of another sough, in order to drain a larger portion of the mineral fields. This sough was on a lower level than the former one. In 1836 the latter sough became so far extended as to drain the water from the former one; and the water supplying the plaintiffs' mills was in consequence diverted. It was held, that no action could have been maintained against the mine owners; and that, accordingly, no action was maintainable against persons who merely stood in the position of their agents. It was observed, that the mill-owner should be taken to have known, that the watercourse had been made for the particular and temporary purpose of getting rid of a nuisance to the mines, and that it might at any time have been discontinued by the mine owners. There could not have been any presumption of a grant at common law of the right to the watercourse. For such a grant would have obliged the mine owners not to work their minerals by the ordinary mode of getting them below the level drained by the sough; and to keep the mines flooded up to that level, in order to make the flow constant for the benefit of the mill-owner. And the right was one which could not have been acquired under the Prescription Act. For that Act only applies to easements, which are enjoyed as of right, and are susceptible of interruption by the servient owner.[1]

The principle of *Arkwright* v. *Gell* is not, however, confined to cases, where the owner in whose property the flow of water originates is the person who diverts the water. The same principle applies so as, *primâ facie*, to exempt from liability Wood v. Waud.

[1] See also Magor *v.* Chadwick, 11 A. & E. 571, 585; Wood *v.* Waud, 3 Exch. 748; Greatrex *v.* Hayward, 8 *ib.* 291; Beeston *v.* Weate, 5 E. & B. 986; Briscoe *v.* Drought, 11 Ir. C. L. Rep. 250; N. E. R. Co. *v.* Elliot, 1 J. & H. 154; Scots Mines Co. *v.* Leadhills Mines Co. 34 L. T. 34; Gaved *v.* Martyn, 19 C. B. N. S. 732; Staffordshire, &c., Canal *v.* Birmingham Canal, L. R. 1 H. L. 254. See s. 2 of the Act cited *ante*, p. 314, n. [8].

intermediate owners who divert water the presence of which is due to accidental circumstances. Thus, in *Wood* v. *Waud*,[1] the owners of a colliery had suffered water to flow out of their colliery in an artificial watercourse into an immemorial and natural stream for more than sixty years. The plaintiff was a mill-owner, whose mills were situated on the banks of the stream. An intermediate owner, through whose lands the artificial watercourse passed, diverted it. It was held, that no action was maintainable. The Court, after recognizing the authority of *Arkwright* v. *Gell*,[2] observed:—"These owners merely get rid of a nuisance to their works by discharging the water into the sough, and cannot be considered as giving it to one more than another of the proprietors of the land through which that sough is constructed. Each may take and use what passes through his land, and the proprietor of land below has no right to any part of that water until it has reached his own land." [3]

Gaved *v.* Martyn.

So in *Gaved* v. *Martyn*.[4] There a tin-tye or artificial cut had been made by tin bounders; and water had been brought by them to the surface, and carried along such cut, for the purpose of streaming for tin. The stream flowed over the defendant's land, and ran into a brook. The plaintiff had conducted this stream by means of a trough or launder[5] across the brook to certain clay-works which he occupied; and he had enjoyed the stream without interruption for more than twenty years. It was held, that the tin bounders could not be considered as having permanently abandoned their right of control over the water; and that the plaintiff had not accordingly any right of action against the defendant for diverting the stream.[6]

[1] 3 Exch. 748.

[2] 5 M. & W. 203; *ante*, pp. 392. 393.

[3] See 3 Exch. 779. In Wood *v.* Waud, the intermediate owner had, besides diverting, abstracted and detained water from an artificial watercourse of a temporary nature, so as to occasion sensible loss to the plaintiff. He was held liable for so doing, but the question was only raised upon a plea of not guilty.

[4] 19 C. B. N. S. 732.

[5] Called in the case the "upper launder." See as to the "lower launder," *ante*, p. 391, n [9]. The lower launder had not been made by the bounders, but was only subject to their rights. See, as to tin bounding and streaming, *post*, Chap. XVIII., Sect. 3, *d*, Sect. 4, *d*.

[6] See also Wardle *v.* Brocklehurst, 1 E. & E. 1060, 1061; Mason *v.* Shrewsbury, &c., Co., L. R. 6 Q. B. 584. Briscoe *v.* Drought (11 Ir. C. L. Rep. 250), to the contrary upon this, cannot be sustained. Cf. Ivimey *v.* Stocker, 1 Ch. 409.

In fact the enjoyment of the easement[1] of discharging water upon the property of a neighbour is of itself no evidence of the existence of an easement in favour of that neighbour of being bound to continue the discharge.[2]

Construction of watercourse under mere license.

Where an artificial watercourse was constructed over the land of the servient owner under a mere license granted by him to the dominant owner; and a successor in title of the dominant owner enjoyed it without interruption for twenty years; and he had no knowledge of the license; the fact of the license is not of itself sufficient to stamp the character of precariousness on the enjoyment. But it is evidence from which a jury may find that there was never any enjoyment as of right.[3]

(γ) *Remedies.*

Remedies for infringing rights—damages.

If a man's rights in an artificial watercourse are infringed, he may recover damages.[4] And it is not necessary to show special damage in order to recover for the diversion of an artificial watercourse, in respect of which rights have been acquired by grant or prescription.[5]

Injunction.

The injured party may also have an injunction.[6] But his right to an injunction may be lost by laches; especially if he has permitted expenditure by the other party.[7] And, if the enforcement of the right would cause inconvenience or injury to the working of a mine, it will not, except in clear cases, be enforced; at all events on interlocutory motion.[8]

[1] See *infra*, Part C, Sect. 1, *b*.

[2] See Briscoe *v.* Drought, 11 Ir. C. L. Rep. 250; Gaved *v.* Martyn, 19 C. B. N. S. 758. Cf. Mason *v.* Shrewsbury, &c., Co., L. R. 6 Q. B. 582, 587.

[3] Gaved *v.* Martyn, *u. s.*, 732: see p. 745, *per* Willes, J. As to acquiring by way of easement a right to the flow of a part of water, which is itself penned back under an acquired easement, see *ante*, p. 385. For a claim to use canal water for mining purposes, based on expectation followed by expenditure, see Bankart *v.* Tennant, 10 Eq. 141. Where rights in an artificial watercourse are acquired either by grant or prescription, such rights are extinguished by unity of seisin, and are suspended by unity of possession, of the land from which and the land to which the water flows: Ivimey *v.* Stocker, 1 Ch. 396, 408.

[4] Gaved *v.* Martyn, 19 C. B. N. S. 732; Ivimey *v.* Stocker, 1 Ch. 408.

[5] See Rochdale Canal Co. *v.* King, 14 Q. B. 122.

[6] Ivimey *v.* Stocker, *u. s.*

[7] See Birmingham *v.* Lloyd, 18 Ves. 515.

[8] See *ib.* Cf. other cases cited *ante*, p. 62, n. [1].

PART B.—FOULING WATER.

a. Water flowing naturally—Defined Course.[1]

Riparian owner may not, *primâ facie*, foul natural surface water.

On the same principle, that a riparian owner may use a stream in a reasonable degree, or abstract or divert it in reasonable quantities,[2] he may, by washing his minerals by means of it, or pumping water from his mines into it, alter its quality in a reasonable degree. But, as he may not sensibly diminish the body of the stream,[3] he may not sensibly alter its quality. He must not, therefore, *primâ facie*, impregnate the stream with poisonous or foul matter.[4]

But may under grant or prescription.

He may, however, acquire by grant or prescription the right to foul the stream.[5] And a right acquired by prescription may be acquired either at common law,[6] or under the Prescription Act.[7] In *Carlyon* v. *Lovering*[8] the plaintiff and the defendant were riparian owners of a watercourse flowing upon the surface. The defendant's property was situated higher up the stream than the plaintiff's, and consisted of tin mines. The defendant, in washing his minerals, sent a quantity of sand, stones, and rubbish, which became dislodged in the process, down the stream; and the stream was in consequence fouled. In an action for so doing a plea of a right under the Prescription Act[7] was held a good plea. In *Wright* v. *Williams*[9] an action was brought for fouling a watercourse on the plaintiff's land. The defendant, who was the owner of a copper mine, pleaded a right

[1] As to what constitutes such water, see *ante*, pp. 380, 381.

[2] See *ante*, p. 382.

[3] See *ib.*

[4] See Hodgkinson *v.* Ennor, 4 B. & S. 229; Pennington *v.* Brinsop Hall Coal Co., 5 Ch. D. 769: see also Wood *v.* Waud, 3 Exch. 748. It is no defence to an action for fouling a stream to show, that it is also fouled by other persons: Wood *v.* Waud, *u. s.*: Wood *v.* Sutcliffe, 2 Sim. N. S. 166; Crossley *v.* Lightowler, 2 Ch. 478; Pennington *v.* Brinsop Hall Coal Co., *u. s.*, 772. As to fouling from natural drainage, *qu.* The point was left open in the Sc. case of White *v.* Dixon, 2 Sess. Cas. (4th ser.), 904.

[5] See Wood *v.* Waud, *u. s.*, 772; Carlyon *v.* Lovering, 1 H. & N. 797, 798. For a claim by implied grant to pollute water, see Hall *v.* Lund, 1 H. & C. 676.

[6] See Bealey *v.* Shaw, 6 East, 214, 215.

[7] See s 2, cited *ante*, p. 314, n. [8].

[8] 1 H. & N. 784.

[9] 1 M. & W. 77.

to sink pits on his own land; to fill such pits with iron; to cover the same with water pumped from the mine for the purpose of precipitating the copper contained in such water; and then a right under the Prescription Act[1] to let off the water impregnated with metallic substances into the watercourse. The plea was held good; on the ground that the right in question was in substance a claim to a watercourse over the land of another person.[2]

Or under custom.

A claim by custom to foul natural surface water was held good in *Carlyon* v. *Lovering*.[3] In that case (the facts of which have been already partly stated[4]), one of the pleas was a plea of an immemorial custom for miners within the stannaries of Cornwall to do the act complained of.[5] The decision was founded on the fact, that the custom in question was not indefinite or unreasonable, but limited to the necessary working of the mines.[6]

Remedies for wrongfully fouling natural surface water.

If a man's natural[7] rights in water flowing in its natural course and in a defined channel are infringed by fouling it, he may, in general, recover damages.[8] The measure of damages will of course be the expenses to which he has been put.[9] He is also, in general, entitled to an injunction to restrain the continuance of the injury. And his right to an injunction is independent of whether he can prove actual damage.[10] If a man's acquired[11] rights in water flowing in its natural course and in a defined channel are infringed by fouling it, he may, in general, recover damages, and have an injunction.[12]

[1] See s. 2, cited *ante*, p. 314, n. [8].

[2] See also Wood *v.* Waud, 3 Exch. 748, 772; and cf. Baxendale *v.* Mc. Murray, 2 Ch. 790.

[3] 1 H. & N. 784.

[4] See preceding page.

[5] See *post*, Chap. XVIII., Sect. 3, *d*.

[6] See, as to the requisites of a custom, *ante*, p. 90, n. [2].

[7] See *ante*, pp. 381, 382.

[8] Wood *v.* Waud, *u. s.*, 748; Pennington *v.* Brinsop Hall Coal Co., 5 Ch. D. 774.

[9] Pennington *v.* Brinsop Hall Coal Co., *u. s.*, 769, 774.

[10] *Ib.*; and see *ante*, pp. 382, 383. For the form of an injunction to restrain the pollution of a stream, see Lingwood *v.* Stowmarket Co., 1 Eq. 77: see also Set. 225 *et seq.*

[11] See *ante*, pp. 384, 385.

[12] See Pennington *v.* Brinsop Hall Coal Co., *u. s.*

b. Water flowing in Natural Course but not in Defined Channel—Percolating Water.

No right, *primâ facie*, to foul water in undefined channel, or percolating water.

It does not follow, that, because water, which does not flow in a defined channel,[1] or which percolates,[2] may, *primâ facie*, be abstracted or diverted, it may be fouled. Whoever fouls water, which does not flow in a defined channel, may, *primâ facie*, be made liable in damages.[3] And whoever fouls percolating water, may, *primâ facie*, be made liable in damages;[4] and may be restrained by injunction.[5]

c. Water flowing in Artificial Channel.

Or water in artificial channel—Magor *v.* Chadwick.

In *Magor* v. *Chadwick*[6] the owners of a mine made an adit through their lands in order to drain the mine. They afterwards ceased to work the mine; and the plaintiffs, who were the owners of a brewery, and through whose premises the water had flowed for more than twenty years after the working ceased, had used it during that time for brewing. The defendants, who were the owners of other mines, and did not claim under the owners of the adit, began to use the adit for the purpose of draining their mines; and, in so doing, they polluted the water. They were held liable.

Whaley *v.* Laing.

In *Whaley* v. *Laing*[7] the plaintiff, by the permission of a canal company, made a communication from the canal to his own premises. By means of the water so conducted he fed the boilers of an engine, which he used for mining purposes. The defendant, without any right or permission from the company, fouled the water in the canal, and, in consequence, the water which came to the plaintiff's premises; and by contact with this water the plaintiff's boilers were injured. It was contended, that the plaintiff had no right to the water until he took it; that, when he took it, it was already fouled; that it was, therefore, his own act which occasioned the injury;

[1] *Ante*, p. 386.
[2] *Ante*, p. 387.
[3] Hodgkinson *v.* Ennor, 4 B. & S. 229.
[4] *Ib.*
[5] Turner *v.* Mirfield, 34 Beav. 390; Womersley *v.* Church, 17 L. T. n.s. 190.
[6] 11 A. & E. 571.
[7] 2 H. & N. 476.

and that he could not, accordingly, have any right of action. The defendant was, however, held liable.[1]

In *Magor* v. *Chadwick* the defendants were strangers, and the plaintiffs had an uninterrupted enjoyment of the water for more than twenty years; and the decision proceeded expressly upon those two grounds.[2] It seems, however, clear, that a person, in whose land an artificial watercourse commences to flow is, *primâ facie*, under an equal disability with a stranger to foul that water, to the prejudice of the person whose land it reaches. And it seems equally clear, that such disability ought not to depend on an uninterrupted enjoyment by the injured party for twenty years; but that it ought to exist, however short the enjoyment may be.[3] Whether, in each of these cases, the disability extends to an intermediate owner through whose land the water flows without any act on his part to induce such flow, is a question of greater difficulty. But it is conceived, that this may also be answered in the affirmative. Other cases of fouling.

If a man's rights in an artificial watercourse are infringed by fouling it, he may of course recover damages.[4] Damages.

d. Rivers Pollution Prevention Act.

Every person, who puts the solid refuse of any quarry into a stream,[5] so as to interfere with its due flow, or to pollute its waters, commits an offence against the Riv. Poll. Prev. Act, 1876.[6] Every person, who puts any solid matter from any mine into any stream, in such quantities as to prejudicially interfere with its due flow; or any poisonous, noxious or polluting solid or liquid matter proceeding from any mine, other than water in the same condition as that in which it has been Offences against the Act.

[1] This decision was in the Exch. Ch. (nom. Laing *v.* Whaley, 3 H. & N. 675, 901), reversed by a majority of the Court, but only upon a question of pleading.

[2] See 11 A. & E. p. 586; and see the observations on this case in Wood *v.* Waud, 3 Exch. 777.

[3] See and consider Wood *v.* Waud, *u. s.*, 777, 779; Whaley *v.* Laing, 2 H. & N. 486: and cf. Hodgkinson *v.* Ennor, 4 B. & S. 229; Turner *v.* Mirfield, 34 Beav. 390. Such a fouling is an excessive user of the acquired easement to discharge the water (as to which, see *post*, p. 402). The point was expressly left open in Magor *v.* Chadwick: see 11 A. & E. 586.

[4] Magor *v.* Chadwick, *u. s.*; Whaley *v.* Laing, *u. s.*

[5] As to the meaning of "stream," see 39 & 40 Vict. c. 75, s. 20.

[6] 39 & 40 Vict. c. 75: see s. 2.

drained or raised from such mine; commits an offence against the Act; unless, in the case of poisonous, noxious or polluting matter, he shows to the satisfaction of the Court, that he is using the best means to render it harmless.[1] Proceedings, however, cannot be taken against any person, who puts refuse from a mine into a stream, save by a sanitary authority; nor without the consent of the Local Government Board. But, if the sanitary authority refuse to take proceedings, the person interested may apply to the Local Government Board, who may direct the sanitary authority to take proceedings. Any person against whom any proceedings are proposed to be taken may object before the sanitary authority to such proceedings being taken.[2] The sanitary authority are empowered to enforce the provisions of the Act.[3] Offences against the Act may be restrained by the summary order of a county court; and disobedience to the order subjects the defaulter to penalties.[4] An appeal lies to the High Court, and a case may be removed there.[5] Proceedings cannot be taken, until the expiration of two months after written notice of the intention to take them has been given to the offender; nor while other proceedings in relation to such offence are pending.[6] However, the powers given by the Act do not prejudice any other powers vested in any person; and such other powers may be exercised, as if the Act had not passed.[7]

Proceedings.

PART C.—DISCHARGE AND ESCAPE OF WATER.

SECT. 1.—DISCHARGE OF WATER.

a. Natural Rights.

No right, *primâ facie* to discharge water.

Primâ facie, a man has no right to be an active instrument in discharging water from his property upon the property of

[1] S. 5.
[2] S. 6.
[3] S. 8.
[4] S. 10.
[5] S. 11.
[6] S. 13.
[7] S. 16.

his neighbour.[1] Thus, in *Arkwright* v. *Gell*,[2] already referred to,[3] and the cases which followed that decision,[4] the person, in whose property the discharge originated, would have had no right, *primâ facie*, to compel his neighbour to receive the discharge.

Upper and lower mines.

In like manner, if an owner, whose mine is upon a higher level, conducts water therefrom to the mine of a lower owner by artificial pipes,[5] or channels ;[6] or, in any other way, actively interferes in conveying water therefrom to a lower mine ;[7] he is, *primâ facie*, liable for the injury thereby caused. Moreover, if a barrier between an upper and a lower mine, which, if left undisturbed, would have prevented an influx of water, has been removed or perforated by the lower owner, the higher owner is not at liberty, *primâ facie*, to conduct water in such a course as to pass by the aperture or perforations into the lower mine. For no man has a right, *primâ facie*, to conduct water to the weak point of his neighbour's boundary.[8] And even, if an upper owner pumps up water from a lower to an upper part of his own mine, and such water thence descends by gravitation into the lower mine, and floods it, the upper owner is liable.[9] And in none of such cases can the upper owner excuse himself on the ground, that he has acted without negligence, and in the due working of his mine, and in order to work it as advantageously as possible.[10]

Absence of negligence immaterial.

[1] See Gaved *v.* Martyn, 19 C. B. N. S. 758 ; Roberts *v.* Rose, 3 H. & C. 162 ; L. R. 1 Exch. 89, 90 ; Hurdman *v.* N. E. R. Co., 3 C. P. D. 173.

[2] 5 M. & W. 203.

[3] *Ante*, p. 392.

[4] Magor *v.* Chadwick, 11 A. & E. 571 ; Wood *v.* Waud, 3 Exch. 748 ; Greatrex *v.* Hayward, 8 *ib.* 291 ; Gaved *v.* Martyn, *u. s.*, 732 ; Mason *v.* Shrewsbury, &c., Co., L. R. 6 Q. B. 578 : see *ante*, pp. 393, *et seq.*

[5] Lomax *v.* Stott, 39 L. J. Ch. 834.

[6] Baird *v.* Williamson, 15 C. B. N. S. 390, 391 ; Westminster, &c., Co. *v.* Clayton, 36 L. J. Ch. 476, 478 ; Plant *v.* Stott, 21 L. T. N. S. 106 ; Phillips *v.* Homfray, 6 Ch. 781.

[7] Haward *v.* Bankes, 2 Burr. 1114 ; Beaufort *v.* Morris, 6 Ha. 340 ; Smith *v.* Kenrick, 7 C. B. 563, 566 ; Fletcher *v.* Rylands, 3 H. & C. 789, 796 ; Smith *v.* Fletcher, L. R. 9 Exch. 65 ; Crompton *v.* Lea, 19 Eq. 127.

[8] Westminster, &c., Co. *v.* Clayton, 36 L. J. Ch. 476, 478. Cf. Lomax *v.* Stott, 39 *ib.* 834. The law of Scotland is the same : see Durham *v.* Hood, 9 Sess. Cas. (ser. 3), 474, where the upper owner had exploded large charges of gunpowder in order to get rid of the water.

[9] Baird *v.* Williamson, 15 C. B. N. S. 376 ; Rylands *v.* Fletcher, L. R. 3 H. L. 341. And see A.-G. *v.* Tomline, 12 Ch. D. 228, 229.

[10] See Westminster, &c., Co. *v.* Clayton, 36 L. J. Ch. 476, 478 ; Rylands *v.* Fletcher, L. R. 3 H. L. 341, 342.

b. Acquired Rights.

Right may be acquired by grant or prescription.

A right may be acquired as an easement by grant; or by prescription at common law, or under the Prescription Act; to interfere actively in discharging water upon the land of another, whether such water does, or does not, originate in the land of the dominant owner.[1] A liberty to drain water from an intended "colliery" will, having regard to the wide meaning of that word,[2] receive a proportionately wide construction.[3] Upon a grant or exception of mines, with liberty express or implied to the mine owner to drain the mines through the property of the grantor or grantee, the mine owner is not, *primâ facie*, entitled so to drain an adjoining mine of which he may also be the owner.[4]

Rail. Cl. Act.

A landowner, whose land is compulsorily purchased by a railway company under the authority of the Rail. Cl. Cons. Act, 1845; who possesses mines under the railway, or within the prescribed distance therefrom, which he is prevented from working by reason of apprehended injury thereto; and who possesses other adjoining mines, which extend so as to lie upon both sides of the railway; has under the Act a similar right to make water communications between such other mines through the intervening land for drainage purposes, exerciseable under similar limitations, and followed by similar consequences, to those already [5] noticed with respect to ways.[6] And the Wat. Cl. Act contains somewhat similar provisions.[7]

Wat. Cl. Act.

Other statutory grants.

The Land Tax Red. Act, 42 Geo. 3, c. 116, contains provisions, reserving mining easements, where land containing mines is

[1] See Arkwright *v.* Gell, 5 M. & W. 203; Magor *v.* Chadwick, 11 A. & E. 571; Wood *v.* Waud, 3 Exch. 748; Gaved *v.* Martyn, 19 C. B. N. S. 758; Roberts *v.* Rose, 3 H. & C. 162; L. R. 1 Exch. 82, 89, 90; Mason *v.* Shrewsbury, &c., R. Co., L. R. 6 Q. B. 583. Cf. Carlyon *v.* Lovering, 1 H. & N. 784. For claims by implied grant to use a drain, see Pyer *v.* Carter, 1 H. & N. 916; Ewart *v.* Cochrane, 4 Macq. 117.

[2] See *ante*, p. 25.

[3] See Hodgson *v.* Field, 7 East, 613, 620.

[4] See and consider Bowser *v.* Maclean, 2 De G. F. & J. 415; Proud *v.* Bates, 34 L. J. Ch. 406; Jegon *v.* Vivian, 6 Ch. 742; Eardley *v.* Granville, 3 Ch. D. 826: in analogy to the rule in case of a right of way, that where a way is granted for a particular purpose, it cannot be used for a different purpose: see *ante*, p. 361.

[5] *Ante*, pp. 370, 371.

[6] See ss. 80, 82 of the Act, cited *ante*, pp. 6 n., 7 n.

[7] See 10 & 11 Vict. c. 17, s. 24.

sold under the powers of the Act.[1] Mining easements in respect of water may also be exercised under the Incl. Act, 22 & 23 Vict. c. 43;[2] by the Duke of Cornwall and his lessees under the Act 7 & 8 Vict. c. 105;[3] by the Crown and persons claiming under it under the Cornwall Subm. Mines Act, 1858;[4] and by the Crown in respect of the foreshore or the adjacent lands under the Crown Lands Act, 1865.[5] These several rights have been already mentioned.[6]

In whatever way a right is acquired in respect of water, it must not be exercised wilfully or negligently.[7]

Not exerciseable wilfully or negligently.

SECT. 2.—ESCAPE OF WATER.

a. Natural Rights—Gravitation—Water present Naturally.

(*a*) *Generally.*

Primâ facie, a man is free from liability, if water, which is present in the ordinary course of nature upon or within or beside his property, escapes from or through his property to that of his neighbour by the mere force of gravitation.[8] If, in such a case, the neighbour wishes to protect himself, he should put up barriers.[9] And this is his only remedy. He cannot, for example, enter upon the property of the other owner, in order to remove the water.[10]

Primâ facie right to permit escape of water present naturally.

[1] *Ante*, p. 146.
[2] *Ante*, p. 276.
[3] *Ante*, p. 277.
[4] *Ante*, p. 279.
[5] *Ante*, p. 280.
[6] See preceding notes.
[7] See Smith *v.* Kenrick, 7 C. B. 515; Rylands *v.* Fletcher, L. R. 3 H. L. 330; Crompton *v.* Lea, 19 Eq. 127, 129.
[8] See Smith *v.* Kenrick, *u. s.*, 515, 564; Fletcher *v.* Rylands, 3 H. & C. 789; Rylands *v.* Fletcher, L. R. 3 H. L. 338, 342; Jegon *v.* Vivian, 6 Ch. 758, 759; Wilson *v.* Waddell, 2 App. Cas. 98, 99; A.-G. *v.* Tomline, 12 Ch. D. 228, 14 *ib.* 63.
[9] See Smith *v.* Kenrick, *u. s.*, 565; Baird *v.* Williamson, 15 C. B. N. S. 392; Westminster, &c., Co. *v.* Clayton, 36 L. J. Ch. 478; Rylands *v.* Fletcher, *u. s.*, 339, 341; Crompton *v.* Lea, *u. s.*, 123, 124: see also Jegon *v.* Vivian, *u. s.* "The water is a sort of common enemy, against which each man must defend himself," Smith *v.* Kenrick, *u. s.*, 566, *per* Cresswell, J.
[10] See R. *v.* Spon Lane Co., 3 Q. B. D. 680, 682, *per* Cockburn, C. J., and Mellor, J. The law of Scotland is the same: see Durham *v.* Hood, 9 Sess. Cas. (3rd ser.) 474.

(β) *Natural User of Property—Damage.*

Well-water.

So, if a man digs a well upon his land; and his neighbour, whose land is on a lower level, afterwards opens a mine, and the water flows into it; the owner of the well is free from liability.[1]

Upper and lower mines—natural workings—Smith *v.* Kenrick.

And if the workings, or an alteration in the workings, of a mine owner upon a higher level are proper and usual, he will be free from liability; although, as the necessary result of such workings, or such alteration, water, which had not previously so descended, descends by gravitation into a lower mine; or water, which had previously descended, descends in greater quantities.[2] Thus, in *Smith* v. *Kenrick*,[3] the plaintiff and the defendant were the owners of collieries A. and B. The collieries adjoined, and B. was on a higher level than A. A predecessor of the defendant, but with whom he had no privity, had made three 'thyrlings' or large holes through a vertical seam of coal in A., which formed a barrier between A. and B. When the defendant became the occupier of B., there was a large body of subterranean water therein, which was supported by a thick horizontal bar of coal in B. The inevitable effect of removing the bar would be, that the water, by the mere force of gravitation, would flow through the thyrlings into A. The defendant nevertheless worked out the bar in the usual and proper course; and A. was in consequence inundated. It was held, that the plaintiff had no remedy.[4] And the principle applicable to water collected by previous workings equally applies to water collected by the workings or alteration in question.[5]

Rainfalls—Wilson *v.* Waddell.

So in the case of surface water produced by rainfalls. Thus, in *Wilson* v. *Waddell*,[6] the respondents were the owners of mines, which dipped towards adjacent mines of the appellants in such a way that rain falling on the surface of the respondents'

[1] See the question asked by Bramwell, B., in Fletcher *v.* Rylands, 3 H. & C. 781. Cf. the converse case of Acton *v.* Blundell, *ante*, p. 388.

[2] See Scots Mines Co. *v.* Leadhills Mines Co., 34 L. T. 34.

[3] 7 C. B. 515.

[4] See also Baird *v.* Williamson, 15 C. B. N. S. 376, 390; Rylands *v.* Fletcher, L. R. 3 H. L. 339, 341; Crompton *v.* Lea, 19 Eq. 123, 124, 126; Hurdman *v.* N. E. R. Co., 3 C. P. D. 174; West Cumb., &c., Co. *v.* Kenyon, 11 Ch. D. 787, 788, 789; A.-G. *v.* Tomline, 12 *ib.* 228.

[5] Crompton *v.* Lea, *u. s.*, 127.

[6] 2 App. Cas. 95.

mines would, unless stopped by such surface or by the minerals thereunder, descend by gravitation into the appellants' mines. The respondents, in the usual and proper course of working, removed their minerals. The superjacent surface in consequence cracked; and the rainfall, which would otherwise have flowed over it, flowed into the respondents' workings, and thence into the appellants' mines. It was held, that this was a *damnum absque injuriâ;* and that the appellants were without a remedy. No servitude, in such cases, lies, *primâ facie*, on the owner of the upper mines, for the benefit of the owner of the mines on the dip, to preserve either the surface, or the subjacent minerals, as water-tight as the undisturbed state of the strata.[1] And even where the upper mine is worked, not by mining, but by quarrying, the result is the same; although, as the consequence, the rain, instead of escaping by the ordinary watercourses, becomes confined in a leaky or porous hollow.[2]

Lomax v. Stott.

Lomax v. *Stott*[3] was decided on similar principles. There the defendants were working mines in two places, A. and B.; B. being to the dip of A., towards which the water from A. would naturally flow in the proper course of working. The defendants worked out the minerals in A.; and then, to save pumping up the water, they stopped up the opening between A. and B. The water in consequence became dammed up in A.; and it then rose so high as to overflow by gravitation the plaintiff's mine. It was held, that the plaintiff had no remedy.[4]

Drifts or ways made in ordinary course in higher owner's property.

And if the higher owner makes a crut, or drift, or way, in his mine, not for the purpose of artificially conducting water into his neighbour's mine, but in the ordinary and proper course of working his own mine; and water flows along such crut, or drift, or way, and floods his neighbour's mine; the higher owner will not, *primâ facie*, be liable.[5]

[1] See Wilson *v.* Waddell, 2 App. Cas. 99.

[2] See Smith *v.* Fletcher, L. R. 7 Exch. 307, 309; 9 *ib.* 66; Fletcher *v.* Smith, 2 App. Cas. 786; and cf. Hurdman *v.* North East Rail. Co., 3 C. P. D. 168.

[3] 39 L. J. Ch. 834.

[4] The barrier between the two mines had been pierced by the plaintiff's predecessors, who, in so doing, had trespassed in the defendants' mine.

[5] See Baird *v.* Williamson, 15 C. B. N. S. 376, 390, 391, where a crut had been made; Jegon *v.* Vivian, 6 Ch. 742, 758, where drifts and ways had been made. See also Scots Mines Co. *v.* Leadhills Mines Co., 34 L.

User of way of necessity.

Upon similar principles, a man who is entitled to sink a shaft through overlying land from the surface to the mines in order to reach and work them,[1] is not apparently the less entitled, because it is shown, that the process of sinking will inevitably let loose a body of water within the overlying land, and thereby ruin it.[2] It is at all events certain, that he will not be restrained from so doing, if the anticipated danger is shown to be visionary.[3]

Law otherwise, where outlet made by higher owner.

Where, however, the outlet into the lower mine was made by or by the default of the higher owner, or his predecessors in title, the principle of *Smith* v. *Kenrick*[4] will not apply. In such a case the higher owner cannot free himself from liability on the ground that the flow from his property is due to gravitation.[5] But if the trespass, and the flow of water which is the subject of complaint, happen at two different periods, and the lower owner has already been compensated for the trespass, he cannot afterwards claim relief on the ground of injury from the water.[6]

Or where barrier against sea removed.

And the owner of the foreshore will not be permitted to remove shingle therefrom, so as to expose the foreshore to the inroads of the sea. For there is no analogy between the principles applicable to water pursuing occult courses and those applicable to a great visible bank operating as a protection against the visible waves of the sea.[7] And it is the duty of the Crown to preserve the realm from the inroads of the sea; at whose instance, therefore, a person who proceeds to destroy a natural barrier against the sea may be restrained.[8]

T. 34; Rylands *v.* Fletcher, L. R. 3 H. L. 330; Phillips *v.* Homfray, 6 Ch. 781: and see Smith *v.* Fletcher, L. R. 9 Ex. 64, 65, 67; nom. Fletcher *v.* Smith, 2 App. Cas. 781.

[1] See *ante*, p. 372.

[2] See Goold *v.* Gt. West. Coal Co., 2 De G. J. & S. 610, *et seq.*

[3] *Ib.*

[4] 7 C. B. 515; *ante*, p. 404.

[5] Firmstone *v.* Wheeley, 2 D. & L. 203. See also Smith *v.* Kenrick, 7 C. B. 560, 564. See, however, Clegg *v.* Dearden, 12 Q. B. 576.

[6] See Clegg *v.* Dearden, *u. s.*; Smith *v.* Kenrick, *u. s.*, 564.

[7] A.-G. *v.* Tomline, 14 Ch. D. 63.

[8] A.-G. *v.* Tomline, 12 Ch. D. 214; 14 Ch. D. 58.

(γ) *Non-natural User of Property—No Damage.*

Not merely is a man, who uses his property according to the natural mode of its user, generally free from liability in respect of any ensuing damage to his neighbour. Where no actual damage has ensued, he is also free from liability, although his user be non-natural.[1]

Freedom from liability, where user non-natural, and no damage ensues.

And, in such a case, his merely temporarily intercepting, as he is entitled to intercept,[2] water, which would otherwise have percolated into his neighbour's property, does not lay him under an obligation to prevent such water from afterwards reaching that property. Thus, in *West Cumb., &c., Co.* v. *Kenyon*,[3] water in a higher mine, which had previously found its way into certain old workings thereof, and had thence percolated into the lower mine, was tapped by and collected into a shaft sunk by the higher owner. The higher owner then made a borehole at the bottom of the shaft. It was admitted, that he did not do so in due course of mining, but only for the purpose of getting rid of the water. The effect of the borehole was to return the water to the old workings; and it thence percolated into the lower mine in the same way in which it would have done, if neither the shaft nor the borehole had been made. In fact the higher owner's operations had no effect whatever beyond the limits of his own property; and they did not cast upon the lower mine any burden, which that mine had not previously borne. The higher owner was held free from liability.[4]

Intercepted water—West Cumb., &c., Co. *v.* Kenyon.

(δ) *Non-natural User of Property—Damage.*

Where, however, as the result of a man's non-natural mode of user, water, which had previously found its way by gravitation and percolation into his neighbour's mine, finds its way in greater quantities, a cause of action arises.[5] And even where

Liability where user non-natural, and damage ensues.

[1] See West Cumb., &c., Co. *v.* Kenyon, 11 Ch. D. 782.

[2] On the principle of Acton *v.* Blundell, 12 M. & W. 324, *ante*, p. 388.

[3] 11 Ch. D. 782.

[4] Reversing *ib.*, 6 Ch. D. 773.

[5] See Smith *v.* Kenrick, 7 C. B. 561; Rylands *v.* Fletcher, L. R. 3 H. L. 339; West Cumb., &c., Co. *v.* Kenyon, 11 Ch. D. 782, 783, 785—790.

it finds its way by a different channel or at a different time, although not in greater quantities, liability may be incurred. For the result may be to throw upon the neighbour's mine a burden which it had not borne before.[1] To escape liability, where damage ensues, the person who has caused the damage must show, that his operations have been ordinary, reasonable, and proper.[2] If, therefore, he is a higher mine owner, he must show, that he has acted prudently in the ordinary course of mining.[3] The removal of the surface by a higher owner, by means of which his mine is flooded, may possibly constitute an unreasonable or improper working, so as to give the injured party a remedy, if the removal is contrary to the usual course of working in the district.[4] But it does not do so on the mere ground, that it is in contravention of a covenant entered into by the higher owner with a third party.[5]

Tapping a stream—Crompton *v.* Lea.

A higher owner will not be justified in incautiously tapping a tarn, and so inundating the country below.[6] And if a higher owner commences to sink a shaft for the purpose of completing the working out of his mines; and the necessary result of allowing him to proceed will be, that the bed of a river will fall in, and the river flow into his workings, and thence into the lower owner's mine; he will be restrained. An act certain to do irretrievable damage to the lower owner, and to endanger the lives of those in his employment, and to bring no advantage whatever to the higher owner, cannot be considered an ordinary, reasonable, and proper mode of working the higher mine.[7] And in none of such cases can the higher owner excuse himself on the ground, that the lower owner by previous workings in his own

[1] West Cumb., &c., Co. *v.* Kenyon, 11 Ch. D. 782, 783, 785—790.

[2] Smith *v.* Fletcher, L. R. 9 Exch. 64, 66, 67; Crompton *v.* Lea, 19 Eq. 129; Fletcher *v.* Smith, 2 App. Cas. 781; Hurdman *v.* N. E. R. Co., 3 C. P. D. 174.

[3] Scots Mines Co. *v.* Leadhills Mines Co., 34 L. T. 34.

[4] Wilson *v.* Waddell, 2 App. Cas. 95, 100.

[5] *Ib.* The higher mine owner there held his property upon lease, and one of the covenants of the lease was, that, when the mines were worked out, he should restore the surface. This covenant he did not perform, and the performance of it would have prevented the injury complained of.

[6] Scots Mines Co. *v.* Leadhills Mines Co., 34 L. T. 34.

[7] Crompton *v.* Lea, 19 Eq. 115, 125, 126, 127, 129. The action was ultimately dismissed: see W. N. 1876, p. 266.

mine has removed minerals, which would otherwise have acted as a barrier against the water.[1]

A fortiori a higher owner will be liable for damage, if his operations have been negligent or malicious.[2] Negligent or malicious operations.

b. Natural Rights—Gravitation—Water present Artificially.

(a) *No Statutory Powers.*

If a person, upon whose land it would not naturally come, brings upon his land, of his own mere will, and for his own purposes, and collects and keeps there, so dangerous an element as water, he does so at his peril; and he is, *primâ facie*, answerable for all the damage, which may result from its escape. Thus, in *Rylands* v. *Fletcher*,[3] the defendant constructed, for the purposes of a mill, a reservoir on a piece of land, adjoining which the plaintiffs were working mines. The plaintiffs had previously worked their mines up to a spot, where there were certain old passages of disused mines. Those passages were connected with vertical shafts, which communicated with the land above, which had been out of use for many years, and which were apparently filled with earth and marl. Shortly after the water was introduced into the reservoir, it broke through some of the old shafts, flowed through the old passages, and flooded the plaintiffs' mine. The defendant was held liable.[4] And the result would have been the same if the disused mines had themselves been worked by the plaintiffs.[5] *Primâ facie* liability where water present artificially—Rylands *v.* Fletcher.

And where a higher owner, for his own convenience, diverts the course of a stream, he must take care that the substituted course shall be capable of conveying off the water, which might flow into it from all such floods and rainfalls as might reasonably be expected to happen in the locality.[6] And his Substitution of new for old course of stream.

[1] Crompton *v.* Lea, 19 Eq. 130.

[2] See Smith *v.* Kenrick, 7 C. B. 515; Baird *v.* Williamson, 15 C. B. N. S. 391; Rylands *v.* Fletcher, L. R. 3 H. L. 330; Crompton *v.* Lea, *u. s.*, 127; Hurdman *v.* N. E. R. Co., 3 C. P. D. 174.

[3] L. R. 3 H. L. 330.

[4] See pp. 339, 340, 342: affirming Fletcher *v.* Rylands, L. R. 1 Exch. 265 (see 279, 280); which reversed *ib.* 3 H. & C. 774. See also Dunn *v.* Birmingham Canal Co., L. R. 7 Q. B. 259, 270. Cf. Humphries *v.* Cousins, 2 C. P. D. 239.

[5] See Rylands *v.* Fletcher, L. R. 3 H. L. 342.

[6] See the dicta in Smith *v.* Fletcher, L. R. 7 Exch. 312, 313; 9 *ib.* 65;

duty in this respect cannot be affected by the mere circumstance that the cubical capacity of the new course may be equal to or greater than that of the old course; or by the circumstance that the old course may have been faulty or defective.[1] He will not be allowed, without incurring responsibility, to reproduce in the new course whatever defects existed in the old one.[2]

Liability irrespective of malice or negligence or unusual user.

Where a higher owner is liable for an injury which the lower owner may sustain through an escape of water, such liability is wholly irrespective of any question as to malice, or negligence, or unusual or unreasonable user.[3]

(β) *Statutory Powers.*

Statutory freedom from liability—Dunn *v.* Birmingham Canal Co.

Different considerations may sometimes apply, where the rights and obligations of adjoining owners are to be found within the provisions of an Act of Parliament, which authorizes the construction of works of public utility and convenience. Thus, in *Dunn* v. *Birmingham Canal Co.*[4] There the defendants' canal was constructed under an Act authorizing them to take land compulsorily; making compensation for all damage, which might at any time whatsoever be sustained by the execution of their works. The minerals under the canal were reserved to the landowners, who were given the conditional right to work usual in such cases.[5] The plaintiff, who was the owner of mines under the canal, complied with the conditions; and he then proceeded to work. He worked properly and without negligence; but knowing, that, as the result of the working, his mines would probably be flooded. The canal was properly constructed, and properly maintained. The effect of the working was, that the strata became displaced; and the mine was flooded. It was held, that the defendants had acted strictly within the powers given to them by the Act; that the principle

Fletcher *v.* Smith, 2 App. Cas. 787, *et seq.*: nom. Smith *v.* Musgrave, 47 L. J. Q. B. 4.

[1] Fletcher *v.* Smith, *u. s.*

[2] *Ib.*: see A.-G. *v.* Tomline, 12 Ch. D. 228, 229.

[3] See Fletcher *v.* Rylands, 3 H. & C. 789; L. R. 1 Exch. 279, 285, 286; Rylands *v.* Fletcher, L. R. 3 H. L. 340, 341, 342; Humphries *v.* Cousins, 2 C. P. D. 245.

[4] L. R. 7 Q. B. 244; 8 *ib.* 42.

[5] Cf. s. 79 of Rail. Cl. Act, 1845 cited *ante*, p. 6 n., which was merely a repetition of previous enactments to a similar effect.

of *Rylands* v. *Fletcher*[1] did not, therefore, apply; that their omission to purchase the plaintiff's mines did not amount to an *injuria*, as they were under no obligation to do so;[2] and that the plaintiff was, accordingly, without a remedy.[3] It was also said,[4] that there was an additional fact of itself fatal to the plaintiff. He had known the probable result of his workings, and had courted the danger which ensued. But this dictum appears of doubtful correctness.[5] It was further said, that the plaintiff could probably have availed himself of the compensation clause which the Act contained.[6] But even if there had been no such clause, the defendants would not have been held liable.[7]

Apparently immaterial that plaintiff knew of probable damage.

Immaterial that compensation clause existed.

On similar principles a local authority, who make sewers under the Pub. Health Act, 1875, are not, *primâ facie*, liable, if the sewage percolates into the subjacent mines. For they are entitled to have the sewers supported by the mines;[8] and the percolation could only therefore ensue from the wrongful act of the mine owner.[9]

Pub. Health Act, 1875.

Generally, however, the principle laid down in *Rylands* v.

But liability where Wat. Cl. Act applies.

[1] L. R. 3 H. L. 330; *ante*, p. 409.

[2] L. R. 7 Q. B. 262, 273; 8 *ib.* 49, 51, 52.

[3] Cf. Sutton *v.* Clarke, 6 Taunt. 29; Whitehouse *v.* Birmingham Canal Co., 27 L. J. Ex. 25; Whitehouse *v.* Fellows, 10 C. B. N. S. 765. It is worth noticing, that in Dunn *v.* Birmingham Canal Co. the Act, which applied, was the same as that which governed the decision in Dudley Canal Co. *v.* Grazebrook, 1 B. & Ad. 59 (see *ante*, p. 326). Accordingly, while the mine owner was held to be without a remedy against the canal owners for the flooding of his mines, the canal owners would, in the events which had happened, if they had sought relief against the mine owner for draining away their canal, have been equally without a remedy.

[4] See L. R. 7 Q. B. 258, 260, *per* Cockburn, C. J.

[5] *Ex hypothesi*, the plaintiff was merely exercising his lawful rights, without which he could not have enjoyed his property: see 283, 284, *per* Hannen, J. No opinion was expressed on the point in Exch. Cham.: see L. R. 8 Q. B. 42.

[6] See L. R. 7 Q. B. 262, 263, 264, 272, 273; 8 *ib.* 46, 47, 48, 52. See *contra*, 7 *ib.* 280, *et seq.*

[7] See L. R. 8 Q. B. 47, 48, 51, 52, 53. See also Blyth *v.* Birmingham Waterworks Co., 11 Exch. 781; Vaughan *v.* Taff Vale R. Co., 5 H. & N. 679; Madras Co. *v.* Carvetinagarum, 22 W. R. 865; Dixon *v.* Metrop. Bd. 7 Q. B. D. 418. If and so far as Barber *v.* Nottingham, &c., R. C. (15 C. B. N. S. 726) is inconsistent with Dunn *v.* Birmingham Canal Co., it must be considered to be overruled. It was treated by Mellor, J. (Dunn *v.* Birmingham Canal Co., L. R. 7 Q. B. 269) as having proceeded upon the ground of actual negligence on the part of the defendants: but see the judgment, 15 C. B. N. S., at p. 748.

[8] See *ante*, p. 312.

[9] *Re* Dudley, 8 Q. B. D. 86, 95, 96.

Fletcher[1] will apply to waterworks constructed under statutory provisions. By the Wat. Cl. Act[2] it is enacted :—"Nothing in this Act or the special Act shall prevent the undertakers from being liable to any action or other legal proceeding, to which they would have been liable for any damage or injury done or occasioned to any mines by means or in consequence of the waterworks, in case the same had not been constructed or maintained by virtue of this Act or the special Act."[3]

Or where construction or maintenance improper.

And if the rights and obligations of a railway or canal company or other corporation are regulated by an Act of Parliament; and the company or corporation would, on the principle of *Dunn* v. *Birmingham Canal Co.*, be in other respects free from liability; they may become liable, if the works authorized to be executed by them have been constructed[4] or maintained[5] improperly, or contrary to the provisions of their Act. And in all such cases every fresh damage from a continuance of the wrongful act is a distinct cause of action.[6]

c. Natural Rights—Vis Major—Act of God, &c.

No liability, where *vis major*, or act of God, or of third party.

Upon the same principle that a man is, *primâ facie*, free from liability, if water escapes from his property to that of his neighbour by the mere force of gravitation, he is, *primâ facie*, free from liability, if the escape is the consequence of *vis major*,[7] or is the act of God.[8] And a person, from whose property

[1] *Ante*, p. 409.

[2] 10 & 11 Vict. c. 17.

[3] S. 27.

[4] Whitehouse *v.* Fellows, 10 C. B. N. S. 765; Barber *v.* Nottingham, &c., R. Co., 15 *ib.* 726. See observations on the latter case in Fletcher *v.* Rylands, L. R. 1 Exch. 277; Dunn *v.* Birmingham Canal Co., L. R. 7 Q. B. 269: see also *ante*, p. 411, n. 7.

[5] Bagnall *v.* L. & N. W. R. Co., 7 H. & N. 423; 1 H. & C. 544. It was held not to be a claim enforceable under the compulsory clauses of the Act; the plaintiff not having been injuriously affected by the works, but by the Company's wrongful conduct with respect to them. See observations on this case in Fletcher *v.* Rylands, *u. s.*, 271; Dunn *v.* Birmingham Canal Co., *u. s.*, 267, 268, 269. See also Whitehouse *v.* Birmingham Canal Co., 27 L. J. Exch. 25.

[6] Whitehouse *v.* Fellows, *u. s.*

[7] See Fletcher *v.* Rylands, L. R. 1 Exch. 280; Rylands *v.* Fletcher, L. R. 3 H. L. 340, *per* Blackburn, J.: see also Carstairs *v.* Taylor, L. R. 6 Exch. 217; Box *v.* Jubb, 4 Exch. D. 76.

[8] See Fletcher *v.* Rylands, *u. s.*; Rylands *v.* Fletcher, *u. s.*; Fletcher *v.* Smith, 2 App. Cas. 787, 788. Cf. Nichols *v.* Marsland, L. R. 10 Exch. 255; 2 Exch. D. 1; Nitro-Phos. Co. *v.* Lond., &c., Docks Co., 9 Ch. D. 503; Dixon *v.* Metrop. Bd., 7 Q. B. D. 418.

water would otherwise inevitably have escaped by the act of God, does not become a wrongdoer, merely because, in order to prevent or mitigate a calamity, he voluntarily does an act which expedites the escape.[1] A similar principle prevails, where the escape is the act of a third party;[2] and, *à fortiori*, where it is due to the neighbour's own default.[3] And these observations apply even to cases like *Rylands* v. *Fletcher*;[4] where the person sought to be made liable has brought a body of water upon his land, which would not naturally have come upon it.[5]

d. Acquired Rights.

Right to protection against escape of water may be acquired.

A right may be acquired as an easement by grant, either voluntary or statutory, to protection against the escape of water by gravitation, or its flow in its natural course.[6] But it is difficult, if not impossible, to acquire such a right by prescription. For the enjoyment of the right could hardly be free from the objection of precariousness.[7]

SECT. 3.—COMBINED EFFECTS OF DISCHARGE AND ESCAPE.

Combined effects of discharge and escape.

Where a mine on a lower level is damaged by an influx of water from the higher mine; and such influx is due to separate and distinct causes, some of which the higher owner is, and others of which he is not, under a duty to control; the higher owner will be liable for so much of the damage as can be attributed to the former causes; and he will be free from liability for so much as can be attributed to the latter.[8]

[1] Thomas *v.* Birmingham Canal Co., 43 L. T. 435.

[2] Box *v.* Jubb, 4 Exch. D. 76.

[3] Fletcher *v.* Rylands, L. R. 1 Exch. 280; Rylands *v.* Fletcher, L. R. 3 H. L. 340.

[4] L. R. 3 H. L. 330: see *ante*, p. 409.

[5] See Rylands *v.* Fletcher, *u. s.*, 340; Fletcher *v.* Smith, 2 App. Cas. 787, 788; Box *v.* Jubb, *u. s.*

[6] See Smith *v.* Kenrick, 7 C. B. 515, 564; Ross *v.* Rugge-Price, 1 Ex. D. 269; Brain *v.* Thomas, 50 L. J. Q. B. 662. The two latter cases were decided under r. 19 of sched. 2 of the Forest of Dean "Coal" award of 1841, mentioned *post*, Chap. XX. *d.* (γ). See, generally, rr. 19 and 18 respectively of schedule 2 of the Coal and Iron awards of 1841, mentioned *ib.* See the Waterworks Cl. Act, s. 27, cited *ante*, p. 412.

[7] See and consider Mason *v.* Shrewsbury, &c., Co., L. R. 6 Q. B. 584.

[8] See Baird *v.* Williamson, 15 C. B. N. S. 376: see also Smith *v.* Fletcher, L. R. 9 Ex. 64, 67; reversing S. C., 7 *ib.* 305.

SECT. 4.—REMEDIES.[1]

Previously specified remedies.

Sometimes particular remedies are specified by anticipation for the damage which may be sustained by an influx of water; in such a way that those remedies only are available. Where this is so, care should be taken, that the specified remedies are pursued.[2]

Ordinary remedies—damages.

Subject to the necessity in proper cases of pursuing specified remedies, a man may be made liable in damages, who discharges water from his mine upon the property of his neighbour, or drains his mine through the property of his neighbour; without having the right to do so.[3] Or the injured party may obtain compensation by way of water-leave rent upon all minerals gotten out of the wrongdoer's mine, which have been drained through the land of the injured party.[4] The fact, that the injured party is a lessee with a short term, may affect the measure of damages: either in his favour; having regard to the probable loss of the mineral which the injury may cause: or in favour of the wrongdoer; having regard to the contingency, that the injured party may refrain from removing the water, and leave the wrongdoer subject to an action by the reversioner.[5]

Water-leave rent.

Measure of damages.

Injunction.

The injured party will also in general be entitled to an injunction to restrain the future user.[6] And, for this purpose, it is immaterial that no special injury can be done him by a

[1] Cf. the law in the case of roadways and airways, *ante*, pp. 378, 379.

[2] See Dunn *v.* Birmingham Canal Nav., L. R. 7 Q. B. 244; 8 *ib.* 42; *ante*, p. 411. Cf. Bagnall *v.* L. & N. W. R. Co., 7 H. & N. 423; 1 H. & C. 544.

[3] Haward *v.* Bankes, 2 Burr. 1114; Firmstone *v.* Wheeley, 2 D. & L. 203; Baird *v.* Williamson, 15 C. B. N. S. 376; Rylands *v.* Fletcher, L. R. 3 H. L. 330; Craven *v.* Kaye, Set. 205; Fletcher *v.* Smith, 2 App. Cas. 781.

[4] See Plant *v.* Stott, 21 L. T. N. S. 106; Jegon *v.* Vivian, 6 Ch. 742; Phillips *v.* Homfray, *ib.* 770. For the form of an inquiry, which will be made with a view to providing such compensation, see Phillips *v.* Homfray, *u. s.*, 776. The L. C. refused (p. 781) on appeal, but chiefly on the ground of expense, to direct the inquiry.

[5] See Smith *v.* Fletcher, L. R. 7 Exch. 313.

[6] Beaufort *v.* Morris, 6 Ha. 340; Westminster, &c., Co. *v.* Clayton, 36 L. J. Ch. 476, 478; Lomax *v.* Stott, 39 *ib.* 834; Jegon *v.* Vivian, *u. s.*; Phillips *v.* Homfray, *u. s.*; Craven *v.* Kaye, Set. 205; Eardley *v.* Granville, 3 Ch. D. 826. For the form of an injunction to restrain an improper user for drainage purposes, see Hilton *v.* Woods, Set. 206.

continuation of the user.[1] And if a man makes an aperture in his neighbour's land for the purpose of draining his mine through it; without having the right to do so; he may, in general, be compelled by mandatory injunction to stop such aperture up.[2] The mandatory injunction may be directed even on interlocutory application.[3] And it may have effect given to it under the superintendence of a special referee.[4]

Abatement.

The injured party may also treat the invasion of water as a nuisance; and abate it accordingly.[5] And although, if there are two ways of abating it, he must, in general, choose the less mischievous, he need not do so, if some injury would be thereby done to an innocent third party, or to the public.[6] And he does not become liable to the wrongdoer, merely because, in order to prevent that injury, he trespasses upon the land of the third party.[7]

Inspection.

A litigant, who has a *primâ facie* case, may usually obtain, on terms, on interlocutory application, liberty to inspect his neighbour's property.[8]

[1] See and consider Powell *v.* Aikin, 4 K. & J. 343.

[2] See Powell *v.* Aikin, 4 K. & J. 343; Plant *v.* Stott, 21 L. T. N. S. 106: see also Walker *v.* Fletcher, 3 Bli. 172 n., 178 n.

[3] See Walker *v.* Fletcher, *u. s.*; Westminster, &c., Co. *v.* Clayton, 36 L. J. Ch. 476, 478. For the form of such injunction, see Westminster, &c., Co. *v.* Clayton, *u. s.*, p. 478, Set. 205.

[4] See Craven *v.* Kaye, Set. 205. Cf. Walker *v.* Fletcher, *u. s.*

[5] See Roberts *v.* Rose, 3 H. & C. 162; L. R. 1 Exch. 82, 89, 90.

[6] *Ib.*

[7] *Ib.*

[8] See *ante*, pp. 383, 384. For forms of orders to inspect, see *post*, Chap. XXII., Sect. 2, *f.* A person, who conveys water into a mine, is sometimes guilty of felony; and punishable accordingly: see *ib.*, Sect. 4, (*a*).

CHAPTER XVIII.

CORNISH AND DEVONSHIRE COURTS, RIGHTS, AND CUSTOMS.[1]

SECT. 1.—STANNARIES COURTS.

a. Jurisdiction and Proceedings.

(a) *Generally—Judge and Officers—Nature of Jurisdiction.*

Generally.

THE Stannaries Court has jurisdiction through the counties of Cornwall and Devon ;[2] and it is peculiar to those counties. The Court for Cornwall is usually held at Truro,[3] and that for Devon at either Plymouth, Devonport, or Stonehouse ;[4] and such Courts are held at least four times in the year.[5] The Court may moreover be held at any place within the Stannaries for the purpose of hearing witnesses and taking evidence.[6] And, in some cases, directions may be given, that petitions to wind up a company shall be heard by the Court in London or Westminster,

[1] For the Cost-Book System, and Cornish and Devonshire Companies, see the next Chapter.

[2] See 6 & 7 Will. 4, c. 106, s. 21 ; 18 & 19 Vict. c. 32, s. 32. Originally the Stannaries were districts paying royalty on tin to the Prince of Wales. There were always Stannaries in Devon as well as Cornwall ; but before 18 & 19 Vict. c. 32 there was no Court of Stannaries except the Court in Cornwall, with a jurisdiction limited to that county : see South Lady Bertha Co., 2 J. & H. 380, 381. The jurisdiction of, and the procedure in, the Stannaries Court are regulated by the ancient charters granted to the tinners (as to which see App. to Smirke's Rep. of Vice *v.* Thomas), and by the following Acts and Orders :—16 Car. I. c. 15 ; 4 & 5 Will. 4, c. 42 ; 6 & 7 Will. 4, c. 106 ; 2 & 3 Vict. c. 58 ; 7 & 8 Vict. c. 19 ; 7 & 8 Vict. c. 65 ; 7 & 8 Vict. c. 105 ; 9 & 10 Vict. c. 95 (s. 141) ; 11 & 12 Vict. c. 83 ; 18 & 19 Vict. c. 32 ; Ord. in Counc. 24th June, 1856 ; Gen. Ord. 20th March, 1857 ; Comp. Act, 1862 (25 & 26 Vict. c. 89) ; 28 & 29 Vict. c. 99 (s. 6) ; 32 & 33 Vict. c. 19 ; Jud. Act, 1873 (36 & 37 Vict. c. 66) ; Gen. Orders and Rules, March, 1876. Further Orders and Rules may be made under the provisions of 18 & 19 Vict. c. 32, s. 23 ; 32 & 33 Vict. c. 19, s. 43.

[3] 6 & 7 Will. 4, c. 106, s. 21.

[4] 18 & 19 Vict. c. 32, s. 33.

[5] 6 & 7 Will. 4, c. 106, s. 21 ; 18 & 19 Vict. c. 32, s. 33.

[6] 18 & 19 Vict. c. 32, s. 21.

or in other parts of England.[1] And, in all cases, whether in Cornwall or Devon, or elsewhere, the Court may make such order by way of injunction or otherwise, as the nature of the case may require.[2] And, during vacations,[3] the Court may grant injunctions in any part of England.[4]

Judge and Officers.

The jurisdiction is principally exercised by the Vice-Warden of the Stannaries;[5] or, in case of his illness or accidental absence, by a Deputy.[6] It is, in some respects, exercised by the Registrar.[7]

Nature of jurisdiction—generally.

The jurisdiction is, so far at least as respects Cornwall, an ancient immemorial jurisdiction; and it has been recognized as such by various ancient charters granted to the tinners of Cornwall.[8] Of these the charter of 33 Ed. 1 is perhaps the most striking; according to which the working tinner in the Stannaries had (except in cases respecting land, life, or limb) the privilege of being sued only in the Stannary Courts, and the Warden or Vice-Warden had authority to hold pleas accordingly.[9] The Court is a court of record;[10] and it possesses both a common law and an equity side.[11] Subject to the difference in the questions in respect of which they may be

[1] Comp. Act, 1862, s. 83; 32 & 33 Vict. c. 19, s. 38.

[2] 6 & 7 Will. 4, c. 106, s. 17; 18 & 19 Vict. c. 32, s. 32. Where there must be a hearing or an argument, it is not the practice to make an order except by consent, or on the voluntary attendance of the parties or their agents: see Proc. in Stan., p. 254, n. (*a*).

[3] As to vacations, see 6 & 7 Will. 4, c. 106, s. 17; 32 & 33 Vict. c. 19, s. 42.

[4] 32 & 33 Vict. c. 19, s. 42.

[5] See 6 & 7 Will. 4, c. 106, ss. 1, 2, 4, 6, 7. As to his appointment, qualifications, and disabilities, see ss. 1, 2, 37, 38; 18 & 19 Vict. c. 32, s. 29.

[6] See 32 & 33 Vict. c. 19, s. 39.

[7] As to his appointment, qualifications, and disabilities, see 6 & 7 Will. 4, c. 106, ss. 22, 37; 32 & 33 Vict. c. 19, s. 39. As to a temporary registrar, see 32 & 33 Vict. c. 19, s. 40; the other officials, 6 & 7 Will. 4, c. 106, ss. 24, 36; 11 & 12 Vict. c. 83, s. 11; 18 & 19 Vict. c. 32, s. 34; salaries, 6 & 7 Will. 4, c. 106, ss. 25, 26, 28, 29, 38; 2 & 3 Vict. c. 58, s. 1; 18 & 19 Vict. c. 32, ss. 25, 27, 34, 36, 38; Comp. Act, 1862, s. 172; 32 & 33 Vict. c. 19, ss. 41, 44: see also 6 & 7 Will. 4, c. 106, ss. 27, 30, 31, 38. Actions against officers of the court must be commenced within three months, and short forms of pleadings must be admitted in such actions: 11 & 12 Vict. c. 83, s. 12.

[8] For these charters, see the App. to Smirke's Rep. of Vice *v.* Thomas.

[9] See Smirke's Rep. of Vice *v.* Thomas, App. p. 14.

[10] 6 & 7 Will. 4, c. 106, s. 21.

[11] See the preamble of 6 & 7 Will. 4, c. 106; Vice *v.* Thomas, Smirke's Rep.; 6 & 7 Will. 4, c. 106, s. 2. It was formerly considered to be a court of law, but not a court of equity: Trelawny *v.* Williams, 2 Vern. 483; Hall *v.* Vivian, reported in Smirke's Rep. of Vice *v.* Thomas, 37; Oppy *v.* De Dustanville, *ib.* 38. See, generally, Vice *v.* Thomas, *u. s.*, 95, 102.

exercised, the general common law and equity jurisdictions are concurrently administered.[1]

General common law jurisdiction.

The general common law jurisdiction in Cornwall is exercised in respect of all personal actions in which one or both of the parties are miners under any of the following conditions:— (1.) Where a miner sues a person not a miner for any cause of action arising within the Stannaries; or touching mines of metallic minerals in the Stannaries; or adventurers in such mines. (2.) Where a person not a miner sues a miner for any such cause of action. (3.) Where a miner sues another miner for any transitory cause of action, whether arising in or out of the Stannaries, and whether it relates to mines and adventures or not.[2] And, for the purpose of determining the jurisdiction, all persons are considered miners when and so long as they are really engaged in searching for or working metallic minerals within the Stannaries, or in making the produce merchantable; whether they are labourers, agents, or adventurers.[3] The general common law jurisdiction in Devon is exercised in respect of questions, in which miners in Devon are concerned; but only in causes and in respect of matters relating to mines.[4]

General equitable jurisdiction.

The general equitable jurisdiction is exercised in respect of questions relating to tin mines, lead mines, copper mines, and all other metals and metallic minerals in Cornwall and Devon.[5]

Non-metallic minerals.

Although non-metallic minerals are not, of themselves, within the cognizance of the Vice-Warden, yet, wherever any mine is worked within the Stannaries by the same adventurers both for

[1] See Ord., March, 1876.

[2] See 6 & 7 Will. 4, c. 106, ss. 7, 41; Proc. in Stan. (1856), Introd. Notice, 10. The jurisdiction was formerly confined to matters in which tin or tinners were concerned: see 16 Car. 1, c. 15, s. 1; preamble of 6 & 7 Will. 4, c. 106; South Lady Bertha Co., 2 J. & H. 380, 381. In Adams *v.* Stannaries (Cro. Car. 333), it was stated, that the jurisdiction was only in respect of tin matters, and where both or one of the litigants was a tinner; and in Reignol *v.* Taylor (7 Mod. 103), it was stated, that there was no jurisdiction, where the plaintiff was not a tinner. But see, as to these cases, Proc. in Stan. (1856), Introd. Not. 14.

[3] Proc. in Stan. (1856), Introd. Not. 13.

[4] 18 & 19 Vict. c. 32, s. 32.

[5] 6 & 7 Will. 4, c. 106, ss. 4, 41; 18 & 19 Vict. c. 32, s. 32. It was formerly confined to matters in which tin or tinners were concerned: see 16 Car. 1, c. 15, s. 1; preamble of 6 & 7 Will. 4, c. 106.

metallic and for non-metallic minerals, the entire mine is within his cognizance.[1]

(β) *Proceedings.*

Actions and plaints.

The common law jurisdiction is exercised in actions, and in suits commenced by plaint. Actions, properly so called, are commenced and prosecuted in a manner, and subject to rules of pleading and procedure, very similar to those applicable to actions in the High Court.[2] Actions for debt or damages not exceeding £50 may be prosecuted summarily by plaint.[3] They are commenced by entering a plaint in writing, and taking it to the Vice-Warden's secretary; who thereupon delivers to the plaintiff a summons requiring the defendant to appear and answer.[4] An infant may sue by plaint for wages, piece-work, or work as a servant.[5] The defendant, within a prescribed time, may file a demurrer or plea to the jurisdiction, and give the plaintiff notice. Or, if he wishes to raise certain special defences, he may give the plaintiff notice of his intention. But he need not, in other cases, unless the Vice-Warden otherwise orders, file or give any plea or notice.[6] The defendant may have relief against third parties under similar circumstances to those provided for in the Jud. Acts and Orders.[7] Actions by plaint may be tried by a jury of five persons.[8] The

[1] 18 & 19 Vict. c. 32, s. 1. Plumbago, or black lead, was by this sect. declared to be a metallic mineral. "Mine" in 6 & 7 Will. 4, c. 106, means any mine, work, or adventure, wherein or connected with which metals or metallic minerals are worked: s. 44. "Mine" or "mineral" in 18 & 19 Vict. c. 32, means, *primâ facie*, metallic mine, or metallic mineral: s. 2.

[2] Ord. March, 1876, tit. Actions, O. 1, r. 1: see this title generally. For forms of proceedings, see Schedule of Forms. As to service of process and substituted service, see 18 & 19 Vict. c. 32, ss. 6, 7, 8; 32 & 33 Vict. c. 19, s. 31; Ord. March, 1876, tit. Actions, Oo. 7, 8, 9. For actions respecting compensation and costs, where the Duke of Cornwall exercises his right of entry on lands, see *ante*, p. 279.

[3] 18 & 19 Vict. c. 32, s. 16.

[4] For the form of the plaint and summons, see Ord. March, 1876, tit. Suits commenced by Plaint, O. 1, rr. 1, 2.

[5] O. 2: see O. 3.

[6] Oo. 7, 8.

[7] O. 9.

[8] 18 & 19 Vict. c. 32, s. 16. Cf. 11 & 12 Vict. c. 83, s. 7. Permission to prosecute by writ instead of plaint may be granted in a proper case: Ord. March, 1876, tit. Suits comm. by Plaint, O. 18, r. 2. See, as to service of the plaint and summons, O. 1; parties to plaints, O. 2; parties under age, O. 3; payment of money into court, O. 4; inspection, O. 5; discontinuance, O. 6; special and other defences, Oo. 7, 8; particulars of demand, O. 10; security for costs, O. 11; trial, O. 12; costs, O.

Bills of Exchange Act, 1855, applies to the Stannaries Court.[1] Trials may be had either before the Vice-Warden, or before the Vice-Warden with a jury.[2] The Vice-Warden may direct and try issues of fact.[3] He may postpone or adjourn trials;[4] and may grant new trials.[5] A rule of Court may be enforced by making it a rule of a superior Court.[6] In certain cases causes may be removed to the Queen's Bench Division.[7]

Pursers' and Creditors' suits.

Pursers' suits and creditors' suits[8] are part of the equitable jurisdiction. A purser's or creditor's suit is instituted by petition, addressed to the Vice-Warden, and entitled of the Stannaries of the county or counties in which the mine or works of the company to which it relates are situate.[9] The petition is taken to the Vice-Warden's secretary; who delivers to the petitioner a summons requiring the defendant to appear and answer.[10] The defendant, thereupon, within a prescribed time, may deliver a demurrer or plea to the jurisdiction, or an answer;[11] and the plaintiff, within a further prescribed time, may deliver a replication.[12] An order against a member for payment of a debt due by the company in question may be enforced by a sale of the defaulter's share.[13] Several adventurers may be joined as defendants in one purser's suit; and

14; amendment, O. 15; interpleader, O. 17. And see, as to forms of proceedings, Sched. of Forms.

[1] Ord. in Counc., 24 June, 1856. See, as to the form of proceedings, and as to costs, Gen. Ord., 20 March, 1857.

[2] Ord. March, 1876, tit. Actions, O. 35, r. 1; tit. Suits comm. by Plaint, O. 12. See, as to jurors and juries, 6 & 7 Will. 4, c. 106, ss. 16, 32, 33, 34, 35; 2 & 3 Vict. c. 58, s. 2; 11 & 12 Vict. c. 83, s. 8; 18 & 19 Vict. c. 32, s. 35. A special jury cannot, apparently, be impanelled except by consent: see Proc. in Stan. p. 262, n. (*b*). Jurors attending are exempted from attendance at sessions: 2 & 3 Vict. c. 58, s. 2; 18 & 19 Vict. c. 32, s. 35.

[3] 6 & 7 Will. 4, c. 106, s. 16. He has power to give the costs of trying an issue: Palmer's case, 7 Ch. 288.

[4] Ord. March, 1876, tit. Actions, O. 35, r. 3; tit. Suits comm. by Plaint, O. 12, r. 9. See, in case of the illness or accidental absence of the Vice-Warden, 32 & 33 Vict. c. 19, s. 39.

[5] 6 & 7 Will. 4, c. 106, ss. 8, 16; 2 & 3 Vict. c. 58, s. 5. See Ord. March, 1876, tit. Actions, O. 38; tit. Suits comm. by Plaint, O. 12, rr. 12, 14.

[6] 6 & 7 Will. 4, c. 106, s. 12.

[7] S. 42.

[8] They are properly speaking actions: see Ord. March, 1876, tit. Purs. and Cred. Suits. They are applicable to cost-book companies, and will be further referred to in the next chapter: see Sect. 2, *c*.

[9] For the form of the petition and summons, see Ord. March, 1876, tit. Purs. and Cred. Suits, O. 1; and Sch. of Forms.

[10] O. 1, r. 10.

[11] Oo. 4, 5.

[12] O. 6.

[13] 6 & 7 Will. 4, c. 106, s. 18.

the Vice-Warden may make one decree for payment, and one order for sale; and payment may be enforced by separate process.[1] In creditors' suits, where several adventurers are sued, or several creditors sue, separately, the suits may be consolidated.[2] Where, in a creditor's suit, a claim is made in respect of goods or the proceeds thereof, sold or intended to be sold, by any landlord for rent or other distrainable demand, or by any other person not being a party to the suit, the Vice-Warden or the Registrar may adjudicate upon such claim by interpleader.[3] And the adjudication is final, and has the force of judgments or decrees.[4] The Registrar is the proper person to make sales under any decree or order of the Court in pursers' or creditors' suits.[5] And, in making such sales, he may act without a license; and without being liable to duty.[6]

Specific performance—declarations of forfeiture—recovery of possession.

The Vice-Warden may also, under the equitable jurisdiction, grant specific performance of contracts for sale; and make declarations of forfeiture for the non-working of setts.[7] Upon a declaration of forfeiture being made for non-working; or upon a sett or lease being determined for breach of condition or otherwise; the Vice-Warden has jurisdiction to entertain proceedings for recovery of possession of the mine in question, being within the Stannaries; and of buildings, machinery, works, and waters, annexed thereto or occupied therewith.[8] But he cannot adjudicate upon any claim touching the freehold or inheritance of any person except by consent.[9]

Injunction.

The Vice-Warden may also, under the equitable jurisdiction, prohibit by injunction the working of any mine in a manner

[1] 18 & 19 Vict. c. 32, s. 4.

[2] S. 5: see also Ord. March, 1876, tit. Purs. and Cred. Suits, O. 16. r. 10. As to service of the petition and summons in pursers' and creditors' suits, see O. 2; appearance, O. 3; hearing, O. 7; evidence, O. 8; discovery, O. 9; decree, O. 10; amendment, O. 12; abatement and revivor, O. 13; injunction, O. 14; and proceedings upon orders of sale, O. 16. And see, as to forms of proceedings, Sch. of Forms. The plaintiff in a creditor's suit is obliged, immediately after filing his petition, to cause to be fixed up at the Account House of the mine in question a notice that he has done so: O. 2, r. 7: see also O. 10, r. 6.

[3] 18 & 19 Vict. c. 32, s. 11.

[4] S. 12. See s. 13 as to staying actions, where an interpleader is pending.

[5] Ord. March, 1876, tit. Purs. and Cred. Suits, O. 16.

[6] Comp. Act, 1862, s. 68. The Assistant Registrar has the same privilege, *ib.*

[7] Proc. in Stan. (1856), Int. Not. 26.

[8] 18 & 19 Vict. c. 32, s. 15.

[9] Ss. 14, 15.

contrary to custom or covenant.[1] And the Registrar may, on the application of a creditor or member, issue injunction orders in creditors' suits; and forbid the sale of setts, leases, machinery, or other effects, on the usual allegation of urgency; or issue such orders in other cases of like urgency, or imminent waste or damage; and may suspend or dissolve the order; subject, however, to reconsideration by the Vice-Warden.[2] The jurisdiction to grant in vacation injunctions in any part of England [3] may be exercised by the Registrar.[4]

Rectification of register—winding-up.

And, under the equitable jurisdiction, the Vice-Warden may summarily rectify the register of a company.[5] And he may wind up a company on petition, as in the Chancery Division of the High Court.[6] And he has a special and wide jurisdiction incidental to a winding up.[7] The Registrar may, with the sanction of the Vice-Warden, when a winding-up order is made, and no official liquidator is appointed, act as official liquidator.[8] But he need not give security; nor is he entitled to remuneration; nor is he liable to penalties.[9]

Special jurisdiction.

The Vice-Warden has a special jurisdiction to decide questions arising out of the rights of working given to the Duke of Cornwall under the Act 7 & 8 Vict. c. 105.[10] Causes pending before a County Court judge within the Stannaries touching the customs of mining;[11] or cost-book mines;[12] or the effect and operation of setts, or licenses; or contracts for the sale and transfer of shares in mines; or tin-bounds;[11] may be remitted for trial before the Vice-Warden.[13] The Vice-Warden may by

[1] S. 15.

[2] 32 & 33 Vict. c. 19, s. 37.

[3] *Ante*, p. 417.

[4] 32 & 33 Vict. c. 19, s. 42.

[5] Comp. Act, 1862, s. 35.

[6] Ss. 79, 81. See, as to the petition, service, and hearing, Ord. March, 1876, tit. Wind. Comp., O. 2; as to the order, O. 3; official liquidator, O. 4; proof of debts, O. 5; list of contributories, O. 6; order of payment of debts or calls, O. 7; payment of moneys, O. 8; investment, O. 9; admission of documents, O. 11; appearance, O. 12; service of summons, notice, &c., Comp. Act, 1862, s. 68; O. 13; witnesses and affidavits, Oo. 14, 15; termination of winding-up, O. 16; costs, O. 18; and appeals, O. 19. And, as to forms, see Sch. of Forms.

[7] See next Chapter, Sect. 5, *b*.

[8] 32 & 33 Vict. c. 19, s. 33.

[9] *Ib*.

[10] See *ante*, pp. 277 *et seq*. See also 8 & 9 Vict. c. 118 (Incl.), s. 18; 26 & 27 Vict. c. 49 (Duchy Manag.), s. 8.

[11] See *infra*, Sect. 3, Sect. 4.

[12] See next Chapter.

[13] 18 & 19 Vict. c. 32, s. 17. See Ord. March, 1876, tit. Suits comm. by Plaint, O. 16.

consent refer proceedings and disputes to arbitration; and he may himself act as arbitrator.[1]

Miscellaneous matters of procedure.

The Vice-Warden has, consistently with the provisions of the Comp. Act, 1862, the same jurisdiction and powers in the case of companies registered under that Act as he has in the case of unincorporated companies. And, for the purpose of giving fuller effect to such jurisdiction, in all actions, suits, or proceedings in the Court, all process issuing thereout, and all orders, rules, demands, notices, warrants, and summonses, required to be served on any company, whether registered or not, or on any member or agent thereof, may, without any special order, be served in any part of England; or may, by special order, be served in any part of Great Britain, or the adjacent islands.[2] And, generally, service of subpœnas on witnesses is good in any part of England or Wales; and may be enforced by process from the Queen's Bench Division, if the expenses be tendered.[3] Oaths may be administered, and affidavits taken by the Registrar, or by commissioners;[4] and affidavits, affirmations, and declarations, are sometimes available, although not sworn, made, or taken, by or before a commissioner of the Court.[5] The Registrar may make orders for amending pleadings; and may determine applications for further time; and may make various other interlocutory orders; subject to appeal to the Vice-Warden.[6] The Registrar is the proper person to tax costs.[7] All applications in Court of whatever kind in a suit are made by motion.[8] But proceedings before the Registrar are by summons.[9]

[1] 18 & 19 Vict. c. 32, s. 20.

[2] Comp. Act, 1862, s. 68.

[3] 6 & 7 Will. 4, c. 106, ss. 9, 10.

[4] 4 & 5 Will. 4, c. 42, s. 1; 2 & 3 Vict. c. 58, s. 6; Ord. March, 1876, tit. Miscell., O. 6.

[5] 32 & 33 Vict. c. 19, s. 27. As to enrolments and copies being evidence, see 11 & 12 Vict. c. 83, s. 6.

[6] 18 & 19 Vict. c. 32, s. 19; Ord. March, 1876, tit. Purs. and Cred. Suits, O. 12. As to the practice on such appeals, see tit. Miscell., O. 11.

[7] Tit. Miscell., O. 12. In Palmer's case, 7 Ch. 288, which was an appeal in a winding-up, the costs were directed to be taxed by the Taxing Master of the Court of Chancery. See also West Jewell, &c., Co., Set. 1601.

[8] See, as to motions, Ord. March, 1876, tit. Miscell., O. 5.

[9] O. 10, r. 1. See O. 10, generally, for proceedings before the Registrar. As to costs, see O. 12. The Registrar has also certain duties to perform under 7 & 8 Vict. c. 105, relating to mines and minerals belonging to the Duchy of Cornwall: see ss. 59, 61, 62, 63, 64; *ante*, pp. 278, 279. The seal (6 & 7 Will. 4, c. 106, s. 19) of the Court, and the signature of the Registrar, are judicially noticed by all courts and judges

(γ) *Concurrent and Exclusive Jurisdiction.*

Personal actions.

In personal actions[1] the jurisdiction of the Stannaries Court and of the High Court has been stated to be concurrent.[2] But the statement is not supported by any decision; and it is conceived, that, if in the High Court privilege were pleaded, the defendant might still rely on the charter of 33 Ed. 1.;[3] so as to oust the jurisdiction.[4] The jurisdiction of the Stannaries Court and of the County Courts in personal actions has, however, been decided to be concurrent.[5] The County Courts Act, 9 & 10 Vict. c. 95, enacts, that all pleas of personal actions, where the debt or damage claimed is not more than £20, may be holden in the County Court; and that no privilege, except as thereinafter excepted, shall be allowed to any person to exempt him from the jurisdiction of any Court holden under the Act.[6] No doubt, it also enacts, that "nothing in this Act contained shall be construed to affect the Courts of the Lord Warden or of the Vice-Warden of the Stannaries of Cornwall; but this provision shall not be deemed to prevent the establishment of any Court under this Act within the said Stannaries, or to limit or affect the jurisdiction of any Court so established under this Act."[7] But the latter enactment only saves the Stannaries Courts, and not the personal privilege of the tinners.[5]

General equity jurisdiction.

As respects the Stannaries Court and the High Court, the general equity jurisdiction[8] of the Stannaries Court appears, so far as it goes, to be exclusive;[9] and, so far as it does not go, the High Court may be resorted to.[10] As respects the Stannaries Court and the County Courts, there is an express enactment, precluding County Court judges from entertaining jurisdiction

in England: Comp. Act, 1862, ss. 68, 125. None but barristers and solicitors can practise in the Court: see 6 & 7 Will. 4, c. 106, s. 20. See, as to change of solicitors, Ord. March, 1876, tit. Miscell., O. 9. A list of fees must be hung up: 6 & 7 Will. 4, c. 106, s. 33.

[1] See *ante*, pp. 418, 419, 420.

[2] See Batten on Stan. Act, 1869, p. 14.

[3] *Ante*, p. 417.

[4] See and consider Newton *v.* Nancarrow, 15 Q. B. 154; 18 & 19 Vict. c. 32, s. 32.

[5] Newton *v.* Nancarrow, 15 Q. B. 144.

[6] Ss. 58, 67.

[7] S. 141.

[8] See *ante*, pp. 420, 421.

[9] Batten, 14. See Trelawny *v.* Williams, 2 Vern. 483; Dan. Ch. Pr., 532. See, however, Chester *v.* Spargo, 18 L. T. N. S. 314.

[10] Batten, 14.

in any case to which the equitable jurisdiction of the Stannaries Court extends.[1]

The jurisdiction to summarily rectify the register of a company,[2] where a name has been improperly entered or omitted, may be exercised by a judge of the High Court, or by the Vice-Warden, at the option of the applicant.[3] The option has been apparently given, because it was considered desirable, that, for the remedy of a wrong of a very peculiar kind, the greatest opportunities should be afforded, and as many doors as possible opened.[4] And the mere fact, that some of the objects of a company established for working within the district of the Stannaries are to be carried out beyond that district, does not exempt the company from the Stannary jurisdiction; at all events so far as relates to the working within the district.[5] Rectification of register.

The Stannaries Court is the proper Court for winding up a company[6] "engaged in working" mines within and subject to the jurisdiction; unless the Vice-Warden certifies, that the company would be more advantageously wound up in the Chancery Division.[7] The reason why concurrent jurisdiction has not been given in the latter case to the High Court is that questions may arise requiring local knowledge or local evidence.[8] However, the words "engaged in working" mean "are or have been engaged in working", or "now or formerly engaged in working"; and they do not apply to a case where a company, although they have purchased a mine within the jurisdiction, have not begun to work it.[9] *A fortiori*, the words "engaged in working" do not apply, where such a company are authorized by their memorandum of association to purchase mines in "Cornwall or elsewhere in England."[10] Winding-up.

[1] 28 & 29 Vict. c. 99, s. 6. For the practice in case of demurrers to the jurisdiction, see 18 & 19 Vict. c. 32, s. 18; Ord. March, 1876, tit. Actions, O. 21, r. 4; tit. Purs. and Cred. Suits, O. 4.

[2] See *ante*, p. 422.

[3] Comp. Act, 1862, s. 35; Penhale, &c., Co., 2 Ch. 398.

[4] Penhale, &c., Co., *u. s.*, 403, *per* Lord Cairns.

[5] Penhale, &c., Co., *u. s.*

[6] See *ante*, p. 422.

[7] Comp. Act, 1862, s. 81. In Walkham United Mines, W. N. 1882, p. 134, the Vice-Warden refused his certificate.

[8] See Penhale, &c., Co., 2 Ch. 403, 404; Silver Valley Mines, 18 Ch. D. 475.

[9] See Silver Valley Mines, *u. s.*, 472; overruling East Botallack, &c., Co., 34 Beav. 82.

[10] Silver Valley Mines, *u. s.*

b. Appeals and Execution.

(*a*) *Appeals.*

Appeals.

Appeals lie to the Court of Appeal;[1] and there may be a final appeal to the House of Lords.[2] But no appeal to the Court of Appeal is allowed, where the debt or damages sought to be recovered do not exceed £20; and where no question of jurisdiction, or of the custom of mining, has arisen in the Court below. No appeal operates to stay proceedings, or is allowed, unless the appellant notifies to the Registrar, within thirty days after notice of the decision appealed against, his intention to appeal; and then gives or offers to give security to the Registrar to prosecute the same, and to abide by the final decision; and also deposits £20 with the Registrar, to be paid to the opposite party if the appeal fails, unless the Court otherwise directs. And if the appeal is prosecuted by a registered company with limited liability, or by a bankrupt, the Registrar may require a sufficient surety to be joined as co-obligor in the bond, who may be personally liable to the extent of £50.[3]

(β) *Execution.*

Execution—generally.

No formal demand is necessary before enforcing orders to pay; or to produce, file, or deliver up books, papers, deeds, or accounts; or to deliver up property.[4] Where a decree, order, or judgment,

[1] Jud. Act, 1873, s. 18. Appeals formerly lay to the Lord Warden of the Stannaries. He was assisted by two or more assessors, who were members of the Judicial Committee of the Privy Council, or Judges of the Superior Courts. The Lord Warden might, however, have at once remitted a cause pending before him for the determination of the Judicial Committee. And, in winding-up cases, he might have remitted appeals to the Court of Appeal in Chancery; whose decision was final without any further appeal. See 18 & 19 Vict. c. 32, s. 26; Comp. Act, 1862, s. 124; 32 & 33 Vict. c. 19, s. 32.

[2] See App. Jur. Act, 1876 (39 & 40 Vict. c. 59), ss. 3, 11. Final appeals formerly lay to the Judicial Committee of the Privy Council: see 18 & 19 Vict. c. 32, s. 26.

[3] 18 & 19 Vict. c. 32, s. 26; 32 & 33 Vict. c. 19, s. 32. See also, as to appeals, Ord. March, 1876, tit. Miscell., O. 14; tit. Wind. Comp., O. 19. Every order pronounced by the Court of Appeal under the Comp. Act, 1862, s. 124, must be drawn up and entered by the Registrar of the Court; and must be remitted by him to the Court of the Vice-Warden, by transmitting an office copy by post, but without fee, to the Registrar of the Vice-Warden: Order of Court, 28th July, 1869: see 4 Ch. xliv. For the form of an order made on appeal from the Vice-Warden, see West Jewell Mining Co. Set. 1601.

[4] 32 & 33 Vict. c. 19, s. 28.

is for payment of money, costs, charges, or expenses, the party prosecuting it may enforce payment by suing out a writ of *fieri facias* to be executed within the jurisdiction without special leave.[1] Where the decree, order, or judgment, cannot be enforced within the Stannaries, any division of the High Court may issue process for the recovery of the amount due. And where the debt or damages sought to be recovered do not exceed £250, any county court, whether within or beyond the Stannaries, may issue like process.[2] A judgment for recovery of possession of mines may be enforced by a writ of possession.[3] An order may, upon the application of the plaintiff, in an action for the detention of a chattel, be made for the specific delivery thereof; and that, if it cannot be found, the defendant be distrained by all his goods until he render it, or yield its assessed value.[4] Obedience to decrees, orders, or judgments, other than those for the payment of money, costs, charges, or expenses, is enforceable by attachment and committal.[5] And, generally, all decrees, orders, and judgments, made or pronounced in the case of any company registered under the Comp. Act, 1862, or any member or agent of such a company, may be enforced in the same manner as in other cases;[6] and in winding-up matters the Vice-Warden has the same power of enforcing his orders as the High Court.[7]

Attachment of debts.

Debts may be attached in a purser's suit, where judgment is given for the payment of money.[8] And, if necessary, an issue may be tried for determining the liability of the garnishee.[9]

[1] Ord. March, 1876, tit. Miscell., O. 2, r. 1.

[2] 18 & 19 Vict. c. 32, ss. 9, 10; 32 & 33 Vict. c. 19, s. 29; Ord. March, 1876, tit. Miscell., O. 2, r. 2. This could not formerly have been done in the case of final decrees on the equity side of the Court: see Harvey *v.* Gilbard, W. W. & H. 552. The judge of a County Court within the Stannaries may remit any claim of interpleader, arising on the execution of process, for determination by the Vice-Warden's Court: 32 & 33 Vict. c. 19, s. 29.

[3] Ord. March, 1876, tit. Actions, O. 42.

[4] O. 43; Tit. Miscell., O. 2, r. 9.

[5] 32 & 33 Vict. c. 19, s. 30; Ord. March, 1876, tit. Miscell., O. 3.

[6] Comp. Act, 1862, s. 68.

[7] S. 120. See Ord. March, 1876, tit. Wind. Comp., O. 8, r. 4; and Sched. of Forms.

[8] Tit. Miscell., O. 4, r. 1.

[9] R. 6. See, as to stay of proceedings, O. 7; service of orders, O. 8; and costs, O. 12. For forms of writs of execution and attachment, see tit. Miscell.; tit. Wind. Comp.; Sched. of Forms. See, as to fees and charges, the tables and schedules at the end of Ord. March, 1876. As to fines and

Sect. 2.—TIN-BOUNDING—GENERALLY.

Generally.

The custom of tin-bounding is peculiar to the counties of Cornwall and Devon. It had its origin in the ancient privileges granted to the tinners of those counties; which date, so far at least as respects Cornwall, from a period long anterior to the Norman Conquest; and which were from time to time affirmed both by royal charters, and at various Stannary Convocations or Parliaments.[1] The custom can only, apparently, be exercised in respect of tin. If a bounder, in working a tin mine, extracts copper from it with the tin, he cannot, apparently, claim the copper.[2] Both tinners and lords of the soil are, in Cornwall, prohibited under penalties from digging or sinking shafts in highways.[3]

Sect. 3.—TIN-BOUNDING IN CORNWALL.

a. Mutual Rights of Owners of Soil and Tinners.

(a) *Generally—Manner of obtaining Bounds—Estate of Bounder.*

Generally.

The right of tin-bounding in Cornwall may be claimed either in respect of land of a private person; or in respect of land within the seventeen ancient assessional manors.[4] And, when claimed in respect of land of a private person, it may be claimed either *de novo;* or in respect of land which has been anciently bounded.[5]

penalties, see 18 & 19 Vict. c. 32, s. 27. Process is executed by bailiffs (7 & 8 Vict. c. 19; 11 & 12 Vict. c. 83. ss. 9, 10). The property provided for the use of the Stan. Court is vested in the Duke of Cornwall: 11 & 12 Vict. c. 83, s. 13.

[1] See (as to the charters) *ante*, p. 417. See pp. x., xi., of Introd. to Conc.'s Rep. of Rowe *v.* Brenton; and the preface to Pearce's Stannary Laws. See also, generally, Pearce; and see "Laws of the Stannaries," Linc. Inn Lib., published at Truro by Heard; Rogers *v.* Brenton, 10 Q. B. 28, *et seq.*, 65. The principal convocations for Cornwall were those of 22 Jac. 1; 11 Car. 1; 2 Jac. 2; 2 Anne; and 26 Geo. 2: for Devonshire, those of 2 Hen. 8; 24 Hen. 8; 25 Hen. 8; 6 Edw. 6; and 16 Eliz. Convocations in some instances apparently made new laws as well as presented old customs: see Rogers *v.* Brenton, *u. s.*, 31.

[2] Rogers *v.* Brenton, *u. s.*, 56, *per* Lord Denman. Cf. Doe *v.* Alderson, reported in Smirke's Rep. of Vice *v.* Thomas, 42.

[3] Pearce, 52; Laws of Stan., 60.

[4] See *ante*, p. 38.

[5] Laws of Stan., 34, 89; Pearce, 37.

Bounding *de novo* in private lands.

The right of bounding *de novo* in the land of a private person is obtained in the following manner:—If the lord of the soil of a piece of waste land, in which a tin-mine exists, and which is unbounded or void of lawful bounds, cannot or will not himself work it, any working[1] tinner may give him three months' notice in writing of his own desire to work. The lord is then entitled, at any time within the three months, to himself work, if he thinks proper to do so; and so to preserve his exclusive rights. In the event of the lord not intervening, the tinner may, at the next ensuing Stannary Court, proclaim openly the bounds which he desires to work; the limits of their corners; the names of his co-adventurers, if any; and all other necessary particulars respecting them: proving the notice to the lord, before the proclamation is received. The proclamation is repeated at the two ensuing Stannary Courts; and, if the tinner's claim is not displaced before the third proclamation, a writ of possession issues from the Court, commanding the bailiff of the Court to put the tinner in possession. Possession is then delivered, and the tinner becomes entitled to search for and work; and, for that purpose, to enter on the surface, and encumber it with buildings, machinery, and refuse stuff.[2] And possession of one mine within tin bounds is a sufficient possession of all the mines within them.[3] But, subject to those rights, the possession of the surface remains in the lord.[4] It is necessary, that the bounds should have four corners, consisting of twenty-four turves or stones, six to each corner; and that they should also have side bounds.[5] The right *de novo* can only be acquired in respect of waste land, while it remains waste. It cannot be acquired, if the waste has once been inclosed.[6]

[1] The privilege is confined to working tinners: see Pearce, 37; Laws of Stan., 35. Officers and "great persons" are disabled; Pearce, 41; Laws of Stan., 41.

[2] See, as to the statements in the text, Laws of Stan., 34, 40, 56, 89, 94; Pearce, 37, 40, 50; R. *v.* St. Agnes, 3 T. R. 480; Rowe *v.* Brenton, Conc. 80, 81; Crease *v.* Barrett, 1 Cr. M. & R. 919, 920, 922; Doe *v.* Alderson, reported in Smirke's Rep. of Vice *v.* Thomas. 41, 42; R. *v.* Crease, 11 A. & E. 677; Crease *v.* Sawle, 2 Q. B. 862, 865; Rogers *v.* Brenton, 10 Q. B. 26, 50—56, 57, 67; Gaved *v.* Martyn, 19 C. B. N. S., 732, 751, *et seq.*; Ivimey *v.* Stocker, 2 Dr. & Sm. 542, 543; 1 Ch. 396, 397, 403, 404.

[3] See Doe *v.* Alderson, 1 M. & W. 212.

[4] *Ib.*

[5] See Pearce, 50; Laws of Stan., 57.

[6] Rogers *v.* Brenton, 10 Q. B. 50.

Bounding in private lands anciently bounded.

The land of any private person, which has been anciently bounded, may, if it is vacant, be entered upon by any tinner, and bounded by him.[1] Such tinner must at the ensuing Stannary Court enter his proclamation, and name his co-adventurers, if any; the limits of the bounds; and the designations of the old and new works.[2] It is not, however, necessary that the land, when entered upon, should be uninclosed.[3]

Bounding in assessional manors.

So much of the several and inclosed customary land within the seventeen assessional manors,[4] as has been anciently bounded with turf, may in like manner be entered upon.[5]

Estate of bounder.

A tin bound, as such, cannot, properly speaking, be made the subject of an action to recover possession.[6] But where a bounder has once worked and been in possession, and has not abandoned it, he is, in strictness, in case of a wrongful entry, entitled to recover "the mine lying within his bounds"; even where he is not in actual possession at the time.[7] The estate of a bounder is, in Cornwall, in the nature of a chattel real.[8]

(β) *Dish or Toll-Tin.*

Dish or toll-tin.

As compensation to the owner of the soil, the bounder is in the great majority of cases obliged to render him a portion of the produce, called the dish or toll-tin. This is usually a fifteenth;[9]

[1] Pearce, 37; Laws of Stan., 34, 56, 89; Crease *v.* Barrett, 1 C. M. & R. 920; Doe *v.* Alderson, reported in Smirke's Rep. of Vice *v.* Thomas, 41, 42; Crease *v.* Sawle, 2 Q. B. 865, 866; Rogers *v.* Brenton, 10 Q. B. 50.

[2] See Pearce, 26; Laws of Stan., 19. The statement of Parke, B., to the contrary in Doe *v.* Alderson, reported in Smirke's Rep. of Vice *v.* Thomas, 42, seems to be incorrect.

[3] See n. [1], and authorities there cited.

[4] See *ante*, p. 38.

[5] Pearce, 37; Laws of Stan., 34, 89; Rowe *v.* Brenton, Conc. 81, 328; Crease *v.* Barrett, 1 C. M. & R. 920; Crease *v.* Sawle, 2 Q. B. 865, 866; Ivimey *v.* Stocker, 2 Dr. & Sm. 542.

[6] See Doe *v.* Alderson, 1 M. & W. 210; Rogers *v.* Brenton, 10 Q. B. 53. In Ivimey *v.* Stocker, 2 Dr. & Sm. 545 (reversed, 1 Ch. 396), V.-C. Kindersley said that there was no clear authority on this point.

[7] See Doe *v.* Alderson, 1 M. & W. 210; S. C. (in a subsequent stage) reported in Smirke's Rep. of Vice *v.* Thomas, 39 (see pp. 41, 44); Vice *v.* Thomas, *u. s.*, 1, 26, 35; Rogers *v.* Brenton, *u. s.*, 52, 53.

[8] Pearce, 51; Laws of Stan., 58; Vice *v.* Thomas, *u. s.*, 10; Ivimey *v.* Stocker, 1 Ch. 404, 405. Cf., as to Devonshire, *infra*, Sect. 4, *a* (α).

[9] Pearce, 37; Laws of Stan., 34. See generally the cases cited, *ante*, p. 429, n. [2].

but, according to certain special customs, a twelfth,[1] or a tenth.[2] In some few cases the render is made in money.[3] In order to secure the due render, tinners are bound under penalties not to break tin at a distance from their works.[4] An action for an account will lie in respect of toll-tin.[5] And, if it is not rendered within three years, the bounds may be avoided.[6] The person entitled to the dish or toll-tin is rateable, as being in receipt of a portion of the mine; and the bounder is exempt.[7]

(γ) *Renewals and Workings.*

Renewals.

The bounder must, or some one on his behalf, in order to preserve his rights against the owner of the soil, annually renew the bounds by a new cutting of the turves, as at the commencement.[8] And keepers of bounds for others, who, without giving notice, suffer them to become void for want of renewal, incur penalties.[9] The obligation to renew applies to side bounds; but in case side bounds are not renewed, while head bounds are renewed, the side bounds only are liable to be lost.[10] However, if the day of renewal is allowed to slip, it may, subject to the right of the owner of the soil to re-enter, be made good by a subsequent renewal before any intervention by a rival tinner.[11] Bounders and keepers of bounds for others are obliged, under penalties, upon request by the owner of the soil, to show the corners of their bounds, and to disclose the day of renewal.[12]

[1] Rowe *v.* Brenton, Conc. 81; Crease *v.* Sawle. 2 Q. B. 865, 866.

[2] Crease *v.* Barrett, 1 Cr. M. & R. 919, 920, 925; R. *v.* Crease, 11 A. & E. 677.

[3] Rowe *v.* Brenton, Conc. 81. Besides the toll-tin a fine was also formerly paid; but this payment has long since ceased: see Rowe *v.* Brenton, Conc. 319. As to the "land dole," see Pearce. 50; Laws of Stan., 57.

[4] Pearce. 57; Laws of Stan., 71.

[5] See Trelawny *v.* Williams, 2 Vern. 483.

[6] Laws of Stan., 95.

[7] This was so before the Rat. Act, 1874 (see R. *v.* St. Agnes, 3 T. R. 480; R. *v.* Crease, 11 A. & E. 677; R. *v.* Todd. 12 *ib.* 816; Crease *v.* Sawle, 2 Q. B. 862, 886); and the law has not been changed: see Rat. Act. 1874, s. 13; Van Mining Co. *v.* Llanidloes, 1 Ex. D. 310. The toller usually takes the toll-tin to a blowing-house, where it is weighed and purchased. The particulars are then entered in the blowing-house books, and are open to inspection. See Crease *v.* Barrett, 1 Cr. M. & R. 919, 923, 924, where the admissibility of such entries in evidence was in question.

[8] See Pearce, 37, 50; Laws of Stan., 34, 57. See *ante*, p. 429.

[9] Laws of Stan., 90, 91.

[10] Pearce, 50; Laws of Stan., 57.

[11] Pearce, 26; Laws of Stan., 20. See Doe *v.* Alderson, reported in Smirke's Rep. of Vice *v.* Thomas, 43, 44.

[12] Laws of Stan., 91, 95.

Workings.

And although the bounder is not compelled to continuous working with absolute strictness, and is allowed a reasonable time for consideration, preparation, and due selection of places and planes, he must not cease to pursue in good faith his original object. If he does, the owner of the soil may resume his exclusive rights.[1]

(δ) *Transfer and Devolution.*

Transfer and devolution

Tin-bounds may be the subject of assignment, settlement, or demise.[2] And it is not an uncommon thing for bounders, instead of working the mines which they have bounded, to let them out to other persons to do so: upon the terms of receiving either a money rent; or a certain proportion of the produce, called the "farm-tin."[3] In the latter case the persons receiving are rateable, as being in receipt of a portion of the mine; and the persons paying are exempt.[4] Tin-bounds may also be the subject of bequest;[5] and they may be liable to the payment of debts and legacies.[6] Being an estate in the nature of a chattel real, they pass to executors.[7]

b. Mutual Rights of Co-Adventurers.

Working and contribution.

If any co-adventurer refuses to set his part to farm, or bring in his men to work, or pay his contribution to the expenses, the other adventurers to the extent of one-half in value may give him notice to do so. If the notice is not complied with, he will be excluded from the bounds and the adventure. And, in that event, he will, in general, be only entitled to the usual and accustomed farm in proportion to his share. But, if the other

[1] Laws of Stan., 95, 106; Rogers *v.* Brenton, 10 Q. B. 64.

[2] Rogers *v.* Brenton, 10 Q. B. 64; Vice *v.* Thomas, Smirke's Rep. 12; Doe *v.* Alderson, reported in *ib.* 43; S. C. 1 M. & W. 210.

[3] Pearce, 40; Laws of Stan., 40, 96; Ivimey *v.* Stocker, 2 Dr. & Sm. 542; 1 Ch. 397. Where there is a doubt, whether lands are under bound or not, it is not uncommon to take a lease both from the party supposed to be bound owner and from the lord: see R. *v.* Crease. 11 A. & E. 683, *per* Coleridge, J.

[4] See R. *v.* St. Agnes, 3 T. R. 480. See *ante*, p. 431, n.[7], and the authorities there cited.

[5] Rogers *v.* Brenton, *u. s.*

[6] Pearce, 51; Laws of Stan., 58.

[7] *Ib.*; Ivimey *v.* Stocker, 1 Ch. 404. See *ante*, p. 430.

adventurers have set their parts, he will be entitled to a proportion of the reserved farm, or of the usual farm, at his election.[1]

Supply of goods—sale of interest.

Adventurers may bring in, in proportionate parts, their own goods for the purposes of the working; the prices for which are fixed periodically, and notified to the adventurers or their agents.[2] Any co-adventurer, who sells his interest, must notify the name of the purchaser to the others.[3]

Fraud.

If any co-adventurer defrauds the other adventurers, he is liable to damages and a fine.[4] And if any co-adventurer fraudulently suffers an old bound to become vacant by non-renewal, and then renews on his own account, the renewal enures for the benefit of the adventurers who are not privy to the fraud; and the person committing the fraud is liable to forfeit £20.[5]

c. *Bounders and other Tinners.*

Titles.

Any tinner, who has been in possession for a year and a day, is not allowed to be dispossessed without a verdict. Indeed, whoever first enters gains a right of property, although not a year and a day in possession, until the title of the rival claimant is determined. But the fruits of the bounds are protected for the benefit of the person ultimately proving his title.[6]

Tinners and unwrought bounds.

Where the owners of bounds leave them unwrought for twelve months, other tinners may, if they give the owners notice of their desire to work, and the owners do not within two months resume the working, enter and work them. But they must, in the case of a 'dry-work,' pay to the owners one seventh of a 'dish;' and, in the case of a 'water-work,' one ninth. And they must give security that they will work properly. And, in the event of an improper working, the owners may re-enter.[7]

Trespass.

Tinners may not carry away tin stuff from adjoining bounds. If they do, a remedy may be had in damages. And where it is

[1] Pearce, 40; Laws of Stan., 40, 96. If the mine in question is worked on the cost-book system, a "purser's suit" (as to which see next Chap., Sect. 2, *c.*) may also be maintained: see Laws of Stan., 101, 102, 103.

[2] Pearce, 51; Laws of Stan., 58.

[3] Laws of Stan., 59.

[4] Pearce, 57; Laws of Stan., 70, 107.

[5] Pearce, 42; Laws of Stan., 42, 90.

[6] Pearce, 41; Laws of Stan., 41, 42, 56, 57.

[7] Laws of Stan., 47, 48, 91, 92, 93; Pearce, 44; Vice *v.* Thomas, Smirke, 13, 30.

suspected, that there has been a breaking of bounds, the owner may, on giving notice, go down and measure the ground in the bounds of the supposed trespasser; and, on resistance by the latter, he may obtain an order for that purpose from the Vice-Warden. The party disobeying such an order may be fined. If, after measurement, it appears that there has been a breaking of bounds, or that the fact is doubtful, a trial may be had, and an interim injunction obtained.[1]

d. Rights in Respect of Water.

Customary right of using and diverting water—streaming for tin.

Bounders are entitled by custom to the free use of the water over the whole of the district within their bounds; and to the right of diverting that water into other streams.[2] Indeed cleansing the produce of their workings by 'streaming' is almost always a necessary part of their operations; and, for this purpose, 'streamers for tin' usually secure a conduit of water from the nearest stream.[3] Bounders may, moreover, carry an adit for the passage of water through other men's bounds in waste lands without leave; although they cannot, of course, claim any benefit in any tin which they may break. But they may not carry an adit through other men's several lands without leave and payment.[4] However, bounders, who disturb 'pot-water,' or divert water from an ancient mill, are liable to an action; and bounders, who maliciously divert water, are liable to penalties.[5] And bounders cannot, *invito domino*, cause a stream of water to be made to flow from other lands over the lands bounded. For such water, although it may be beneficial to them, may be injurious to the owner of the soil.[6]

Ivimey *v.* Stocker.

Where bounders have, from before the time of living memory, used for the purposes of their works the water of an artificial watercourse arising in the land of another person, the right to the use of the watercourse is presumed to be a right belonging

[1] Laws of Stan., 97. Whoever forcibly enters on tin works, and disturbs the workers, is liable to penalties and a fine: Pearce, 45; Laws of Stan., 48.

[2] Rogers *v.* Brenton, 10 Q. B. 67; Gaved *v.* Martyn, 19 C. B. N. S., 732, 751, *et seq.*

[3] See Pearce, xiii.; Rogers *v.* Brenton, *u.s.* As to streaming for tin, see *ante*, p. 284.

[4] Pearce, 44; Laws of Stan., 46.

[5] Laws of Stan., 104.

[6] Ivimey *v.* Stocker, 1 Ch. 405, 409.

to the land in which the bounders are exercising their customary privileges; and not a right conceded to them as bounders. If, therefore, the bounders abandon their works, the right to the use of the watercourse enures for the benefit of the owner of the soil; and the owner of the land in which it arose will not be permitted to divert it.[1] And the mere fact, that the owner of the land in which it arose was also one of the bounders does not create a unity of possession; so as to extinguish the right.[2]

Customary right of washing minerals, and discharging sand, &c.

Bounders are entitled by custom to wash their minerals in the streams of water within their bounds; and to send down such streams the sand, stones, rubble, and other stuff dislodged in the process of the workings.[3] And this right exists even in the case of natural surface streams; and although its exercise may either foul or obstruct them, to the damage of other riparian owners.[4] They must not, however, in exercising the right, injure rivers, or lands adjoining rivers. And if, as a consequence of its exercise, lands become overflowed by a river, they are bound, within two days after receiving notice from any person thereby injured, to clear the river; and, in default, are liable to damages and to a fine.[5] And, for the protection of the havens and ports in Cornwall, persons, who stream for tin near any waters or rivers flowing into such havens or ports, are under a statutory obligation to prevent the dislodged sand, stones, gravel, and rubble from being conveyed into such havens and ports; and this obligation is enforceable under penalties.[6]

Discharging water.

Bounders are not entitled to let off water through other men's adits without leave and payment.[7]

c. Validity of Custom.

Validity of custom has been doubted.

The validity of the custom of tin-bounding in Cornwall has been judicially doubted; on the ground, that it involves a claim

[1] *Ib.* 396, 404, &c.; reversing S. C. 2 Dr. & Sm. 537.

[2] Ivimey *v.* Stocker, 1 Ch. 408. See further, as to this case, *ante*, p. 391.

[3] See Carlyon *v.* Lovering, 1 H. & N. 784.

[4] *Ib.* The custom is not unreasonable: see *ante*, p. 397.

[5] Laws of Stan., 105. No such notice appears to have been given in Carlyon *v.* Lovering, *u. s.*

[6] 23 Hen. 8, c. 8, s. 1; 27 Hen. 8, c. 23, s. 2.

[7] Pearce. 44; Laws of Stan., 46.

by custom to a right of profit *à prendre in alieno solo*.[1] And in other respects the custom has been said to be also open to objection. It has been objected (2) that no evidence has ever been adduced, which prescribes any limit to the area capable of being bounded : (3) that, if a large area is inclosed, it is uncertain what extent of working within it will satisfy the custom : (4) that the custom asserts a right not merely to take, but to search for ; and that it may, therefore, seriously affect titles to land, although not actually containing tin : (5) that the exercise of the custom may destroy any mineral, which may be mixed with tin : and (6) that, in lands of customary tenure, toll is payable, not to the customary tenant who may alone be injured by the workings, but to the lord who may sustain little or no injury.[2]

But probably on insufficient grounds.

It cannot be doubted, that these are weighty objections. It has, however, been expressly decided, that the first of them is immaterial.[3] It may be, that the right of tin bounding involves a claim by custom to a right of profit *à prendre*. But it is not therefore bad. If it were not claimable by custom, it would not be claimable at all ;[4] except, perhaps, as part of the local law of a particular district.[5] For it is incapable of acquisition by prescription.[6] It has, however, been broadly stated, that the right of tin-bounding is not in fact a right of profit *à prendre ;* but is, on the contrary, an interest in the land itself. A right of profit *à prendre* is merely the privilege of digging a part of another's soil for a special purpose ; and a right to take the whole of a particular product at the taker's discretion, as the right of tin-bounding is, cannot, it has been stated, be properly so described.[7] If these statements are correct, they furnish of themselves a complete answer to the first objection. The second and third objections may probably be answered by saying, that

[1] See A.-G. *v.* Mathias, 4 K. & J. 591 : see *ante*, pp. 90 *et seq.*

[2] See Rogers *v.* Brenton, 10 Q. B. 66, 67, 68.

[3] Rogers *v.* Brenton, 10 Q. B. 26. See also Gaved *v.* Martyn, 19 C. B. N. S. 752, 757 Ivimey *v.* Stocker, 1 Ch. 403.

[4] Rogers *v.* Brenton, *u. s.*, 62. Cf. the case of copyholders, *ante*, pp. 91, 92.

[5] See Doe *v.* Alderson, reported in Smirke's Rep. of Vice *v.* Thomas, 40 ; Gaved *v.* Martyn, *u. s.*, 757.

[6] Rogers *v.* Brenton, *u. s.*, 60, 61. See *ante*, pp. 95, 96.

[7] See Elton on Commons. 111, 115, 116, 117.

reasonableness must determine both the area capable of being bounded, and the extent of working necessary to satisfy the custom. The fourth and fifth objections may be answered by saying, that the inconveniences or hardships in question are of themselves insufficient to establish the invalidity of the custom. And the sixth objection may probably be answered by saying, that arguments based on hardship, which might with propriety be applied to the case of ordinary persons, cannot with equal propriety be applied to the case of customary tenants. Independently of these considerations, it may be said to be for the benefit of the public, that minerals should not remain locked up in the bowels of the earth.[1]

SECT. 4.—TIN-BOUNDING IN DEVONSHIRE.

a. Mutual Rights of Owners or Occupiers of Soil and Tinners.

(*a*) *Generally—Estate of Bounder.*

Generally.

No tinner is entitled to work in meadow grounds (except in places where tin has usually been wrought); or in any orchard, garden, mansion house, or buildings, or in any curtilages belonging thereto; or in any tillage land; or in any land, where grain or corn is grown; without licence both of the lord of the soil and of the tenant in occupation; on pain of forfeiting £5 and treble damages.[2] Subject to this, any tinner may dig tin, wherever it may be found, in Devonshire; and any person, who hinders him, is liable to a penalty of £40.[3]

Estate of bounder.

The estate of a bounder is, in Devonshire, an estate in fee simple.[4]

(*β*) *Dish.*

Dish.

The tenth part of the profit of tin worked in any meadow, pasture, or tillage belongs to the lord of the soil and the tenant in occupation in equal shares.[5]

[1] See Rogers *v.* Brenton, *u. s.*, 50. The custom has been recognized, although not unreservedly, by statute: see 6 & 7 Will. 4, c. 106, s. 43; 7 & 8 Vict. c. 105, ss. 32, 84; 18 & 19 Vict. c. 32, s. 17.

[2] Pearce, 248.

[3] *Ib.* 190. Cf., as to Cornwall, *ante*, pp. 429, 430.

[4] Pearce, 196, 202, 215. Cf., as to Cornwall, *ante*, p. 430.

[5] Pearce, 249. Cf., as to Cornwall, *ante*, pp. 430, 431.

(γ) *Renewals and Workings.*

Renewals. Bounders are obliged, in order to preserve their rights, to renew their bounds yearly between the feasts of St. Peter Advincula and St. Michael the Archangel.[1]

Workings. Bounders must not, in working, injure any timber or woods; without the licence both of the lord of the soil, and the tenant in occupation; on pain of forfeiting £5, and treble damages.[2] And they are obliged to level all wrought places in meadows within one year; but not so as to injure the conveyance of water to or from any works.[3]

(δ) *Transfer and Devolution.*

Transfer and devolution. Tin bounds in Devonshire may be the subject of conveyance, or devise.[4] Being fee simple estates, they devolve, on intestacy, on the heir-at-law. And if the heir is under sixteen years of age when his title accrues, the next of kin, or some nominee of the father or mother, enters and works; and accounts to the heir when he attains sixteen.[5]

b. Mutual Rights of Co-Adventurers.

Working and contribution. Any co-adventurer may work in his own work for his own part.[6] Every co-adventurer is bound to contribute to the expenses; and, if he refuses to do so, he will be disentitled to share in the profits.[7] Any gift or conveyance of his interest, made for the purpose of escaping contribution, is void.[8]

Fraud. If any co-adventurer colludes with a stranger to defraud the other adventurers by allowing the stranger to 'pitch' new bounds without informing the other adventurers, he is liable to forfeit his share, and to pay a penalty of £20. And the stranger is liable to a similar penalty.[9]

[1] Pearce, 200, 257. Cf., as to Cornwall, *ante*, p. 431.
[2] Pearce, 248.
[3] *Ib.* 249.
[4] *Ib.* 196, 223.
[5] *Ib.* 194. See *ante*, p. 437. See further, as to infants, Pearce, 195.
[6] Pearce, 197.
[7] *Ib.* 214.
[8] *Ib.* 210.
[9] *Ib.* 194.

c. Bounders and other Tinners.

If bounders fail to renew at the prescribed time,[1] other tinners may 'pitch' before the Feast of All Saints next following. They must then give warning to the bound-owners. And they must enter the name of the 'pitch' in the books of the Stannary Court the next time it meets; with their own names, those of their co-adventurers, those of the owners, and the day and place of warning. Proclamations are then made in the Court; and the owners are entitled to come in, and prove, if they can, that no default has been made. And, on their failure to do so, the title of the 'pitchers' is established.[2] Tinners and unrenewed bounds.

Taking tin from tin works is prohibited. If it is improperly taken, an action will lie to recover it.[3] Trespass.

d. Rights in Respect of Water.

Bounders are entitled by custom to carry water to and from their works in, over, or through meadows, orchards, woods, groves, and other land;[4] and any person hindering them is liable to a penalty of £40.[5] They are not, however, entitled to divert water from streams into their mines, and for that purpose to dig trenches over other persons' lands.[6] And 'streamers for tin' are not allowed to injure the works of other tinners.[7] And the same provisions exist for the protection of the havens and ports of Devonshire,[8] as of Cornwall.[9] Rights in respect of water.

e. Validity of Custom.

So far as the custom of tin-bounding in Devonshire is, as in the case of many descriptions of land it is, a custom to take the soil of another person without compensating him, it is wanting in the element of reasonableness; and without doubt is accordingly invalid.[10] The custom is frequently invalid.

[1] *Ante*, p. 438.
[2] Pearce, 200, *et seq.*, 257.
[3] *Ib.* 211.
[4] *Ib.* 190, 249.
[5] *Ib.* 190.
[6] Bastard *v.* Smith, 2 M. & Rob. 129.
[7] Pearce, 204, 205. As to 'streamers,' see *ante*, pp. 284, 434.
[8] 23 Hen. 8, c. 8. s. 1; 27 Hen. 8, c. 23, s. 2; Pearce 204, 205, 242.
[9] *Ante*, p. 435.
[10] See Rogers *v.* Brenton, 10 Q. B. 68. It is only in the case of meadows,

Sect. 5.—Other Rights and Customs.

Title to manorial mines.

The lord of a manor in Cornwall may, it seems, by conveyance and acts of ownership, establish his right to all tin mines within the manor; although under the freehold tenements thereof.[1]

Leases and licenses.

Where an agreement was entered into in writing for a tin sett in Cornwall, and no time was fixed for its duration, the duration was, by the custom of the Stannaries, said to be as long as the adventurers were willing to work.[2] Where adventurers, entitled to mining concerns in Cornwall under leases or licences, allow more than a year and a day to pass without working, the leases or licences become, it is said, avoided by the usage of the Stannaries; and the lessor or grantor may re-enter.[3]

Devolution of tolls.

Where toll, or a proportionate part of ore, is reserved as a rent upon a mining lease in Cornwall, made by a tenant for life under a power, the benefit of it, as in the case of a money rent, devolves upon the remainderman.[4] And, where, upon a lease of mines being granted by a tenant for life under a power, a toll of one-sixth of the produce was reserved; and a power was reserved to the lessor to take up at any subsequent time another sixth, upon payment of a proportion of the expenses up to that time incurred, and upon agreeing to pay a proportion of the future expenses;[5] it was held, that the benefit of this power devolved upon the remainderman.[6]

Drainage adit.

No custom exists in Cornwall, by virtue of which an adit once artificially made for draining a mine may always be used for that purpose; so as to prevent rights to the prejudice of that purpose from being acquired in respect of the water issuing from the adit.[7]

pastures, and tillages, that a portion of the profit goes to the lord of the soil and the tenant in occupation: see *ante*, p. 437. As to the requisites of a custom, see *ante*, p. 90, n. [2]. See and consider Bastard *v.* Smith, 2 M. & Rob. 129; *s. c.* 5 A. & E. 827. Cf. as to Cornwall, *ante*, pp. 435, 436, 437.

[1] See Curtis *v.* Daniel, 10 East, 273.

[2] Trelawny *v.* Williams, 2 Vern. 484. Cf. Basset *v.* Basset, Amb. 843.

[3] See Norway *v.* Rowe, 19 Ves. 146.

[4] Basset *v.* Basset, Amb. 843; Campbell *v.* Leach, *ib.* 748.

[5] Such a power was in the mining vernacular of Cornwall known as a 'pleasure dole.'

[6] Basset *v.* Basset, Amb. 843.

[7] See Magor *v.* Chadwick, 11 A. & E. 571: see pp. 572, 573, 581, 584.

Evidence of what has taken place in one manor in Cornwall or Devonshire may, it seems, be admitted for the purpose of explaining or showing the custom in another; even where the question is with respect to the right to minerals as between a lord and the tenant.[1] And the ancient answers of conventionary tenants of one of the seventeen ancient assessional manors[2] of Cornwall, stating the rights of the lord, have been received in evidence against the freeholders of the manor;[3] the custom of mining in a particular district having been in question; and the conventionary tenants having been persons who had a competent knowledge on the subject, and who were consulted as such.[4]

Evidence of custom.

[1] See Rowe *v.* Brenton, 8 B. & C. 758; Anglesey *v.* Hatherton, 10 M. & W. 237. Cf. Ely *v.* Warren, 2 Atk. 189. This forms an exception to the general rule: see *ante*, p. 93.

[2] See *ante*, p. 38.

[3] See Crease *v.* Barrett, 1 Cr. M. & R. 919.

[4] See *ib.* pp. 928—930. It was formerly necessary to coin tin in Cornwall, and duties in respect of the coinage were payable to the Crown (see Vice *v.* Thomas, Smirke's Rep. App. 89). But by 1 & 2 Vict. c. 120 the necessity for coinage was abolished: the duties on the coinage were made to cease: an annual sum payable to the Crown was substituted therefor; and provision was made for the payment of new duties of customs on tin and tin ore in reduction of the duties, which were previously payable (see ss. 1 to 8 inclusive). And by 2 & 3 Vict. c. 58, s. 1, provision was made for an assessment on tin ore in Cornwall. The Crown had also formerly (as in strictness it still has) the right of preemption of tin in Cornwall. This right was not by prerogative, but was an "ancient right and inheritance" (Case of Stannaries, 12 Rep. 9). It was enforced as lately as the last century. The price and terms were usually settled by negotiation between the Crown on the one side, and the tinners represented by the Stannary Parliaments on the other: see Rogers *v.* Brenton, 10 Q. B. 38, n. (*c*): see also Vice *v.* Thomas, Smirke's Rep., App. 91.

CHAPTER XIX.

THE COST-BOOK SYSTEM AND CORNISH AND DEVONSHIRE COMPANIES.

SECT. 1.—GENERALLY.—REGISTRATION.—MANAGEMENT.

a. Generally.

Cost-book companies usually, but not always, in Cornwall or Devon.

COST-BOOK companies were first known, and they chiefly exist, in Cornwall and Devon. In fact almost every open mine in those counties is or was until recently worked on the cost-book system;[1] and every mining association therein is or was until recently presumed to have been formed on that system, in the absence of express agreement to the contrary.[2] Cost-book companies are not, however, peculiar to Cornwall and Devon. They are to be met with in other parts of England;[3] in Wales;[4] in Ireland;[5] and even in the Colonies.[6] And the legality of concerns, formed before the commencement of the Comp. Act, 1862, and worked on the cost-book system in Wales, or in other parts of England than Cornwall or Devon, cannot be disputed; no matter of what numbers their proprietary may consist, and although they may not be registered under that Act.[7] No mining partnership, consisting of more than

[1] Proc. in Stan. (1856), Introd. Notice, p. 21.

[2] *Ib.* p. 28.

[3] See Clarke *v.* Hart, 6 H. L. C. 633 (Cumberland); Edwards' Case, 1 L. T. N. S. 399 (Staffordshire); Appletrewick Co., 18 Eq. 95 (Yorkshire).

[4] See Curling *v.* Flight, 5 Ha. 242; 6 *ib.* 41, 44; 2 Ph. 613, 614; Pennant &c. Co., 15 Jur. 1192; Atwood *v.* Ernest. 13 C. B. 881; Jennings *v.* Broughton, 22 L. J. Ch. 587 (S. C. 5 De G. M. & G. 136); Fenn's Case, 1 Sm. & G. 26; 4 De G. M. & G. 285; Mayhew's Case. 5 De G. M. & G. 837; Arundell *v.* Atwell, cited in Tapping's Readwin Prize Essay, p. 7; Hawkins' Case, 2 K. & J. 253; Walker *v.* Bartlett, 18 C. B. 845; Birch's Case, 2 De G. & J. 10; Lofthouse's Case, *ib.* 69; Welsh Potosi Co., 27 L. J. Ch. 311; Humby's Case, 28 *ib.* 875; Birch's Case, *ib.* 894.

[5] The Kilbricken Case, cited in Tapping. 7. See 30 L. T. 185.

[6] See Proc. in Stan. (1856), Introd. Not., p. 20; Robson *v.* Devon, 3 Jur. N. S. 576, 4 *ib.* 245.

[7] See R. *v.* Frankland, 9 Jur. N. S.

twenty persons, can, however, be formed since that Act, unless it is registered under it; or is formed in pursuance of some other Act, or of letters patent; or works within and subject to the jurisdiction of the Stannaries.[1] And, to bring a partnership or company within the latter description, it must work for metallic minerals in Cornwall or Devon.[2]

Working "within and subject to the Stannary jurisdiction."

A scrip mine is only another name for a cost-book mine. It might, no doubt, seem from expressions used in some of the reported cases, that a difference exists.[3] But such expressions were due to an imperfect apprehension of the nature of the cost-book system.[4]

Scrip mines.

In general, as the first step towards the formation of a cost-book company, one or more persons obtain from the owner of the soil a grant or licence to search for minerals. This grant or license is considered to be in trust for the company; and, only in very rare cases, is there a formal declaration of trust in writing.[5] But, whether there is a formal declaration of trust or not, the grantees are entitled, as between themselves and the company, to be indemnified and held harmless in respect of it.[6]

Formation of a cost-book company—grant or license.

A meeting is then held of the persons intending to become adventurers in the proposed concern; who decide on the number of shares into which it shall be divided, the number to be allotted to each, and the corresponding proportions in which each shall contribute to the expenses of the working.[7] They sometimes agree upon a fixed capital;[8] and they sometimes constitute the

Meeting of adventurers and record of arrangement.

390, *per* Erle, J. See also the cases cited *ante*, p. 422 n. [4], in none of which was any question raised as to the legality of the concern.

[1] Comp. Act, 1862, s. 4. An ordinary partnership, consisting of more than twenty persons, and having for its object to get, win, and sell minerals, must be registered: see Crowther *v.* Thorley, 31 W. R. 564, cited *ante*, p. 261, n. [5].

[2] See *ante*, pp. 418, 419.

[3] In Hawken *v.* Bourne, 8 M. & W. 709, the mine in question is stated to have been a 'scrip mine.' In Ricketts *v* Bennett, 4 C. B. 686, a difference between a scrip mine and a cost-book mine was in the argument suggested to exist: see p. 690.

[4] See Tapping, pp. 1, 2.

[5] Kittow *v.* Liskeard, L. R. 10 Q. B. 10. See also Hayter *v.* Tucker, 4 K. & J. 247.

[6] Kittow *v.* Liskeard, *u. s.*

[7] For the description in the text, see Kittow *v.* Liskeard, L. R. 10 Q. B. 9. See also Curling *v.* Flight, 6 Ha. 45, 2 Ph. 614; Watson *v.* Spratley, 10 Exch. 235; Peel *v.* Thomas, 15 C. B. 714.

[8] See De Castro's Case, 2 Jur. N. S. 1203; Harvey *v.* Clough, 8 L. T. N. S. 324; Johnson *v.* Goslett, 18 C. B. 728; 3 C. B. N. S. 569.

shares of a fixed amount.[1] They sometimes also provide, that it shall be imperative to issue new shares, if further capital is required.[2] All such cases are, however, rare; and are, in strictness, a departure from the normal type of the system.[3] For their intention generally is that goods shall be ordered on credit from time to time,[4] according as they are necessary for the purposes of the concern; and, that, for the payment of such goods, money shall be from time to time provided by means of calls or contributions.[5] They usually appoint an officer called a 'purser' to act as their agent; and they frequently appoint, in addition, one or more 'captains' to assist the purser. But, in many cases, they appoint a managing committee and a secretary; who discharge the duties, which would otherwise devolve upon the purser.[6] They enter the particulars of their arrangement, and their own names and addresses, in the cost-book; which is a book kept for the purpose of entering their 'costs,' or working expenses;[7] and which gives its name to the system.[8] And they then sign, or ought to sign, the cost-book.[9] The cost-book does not require an agreement stamp.[10]

Rules regulating cost-book companies.

The majority of companies, purporting to be worked on the cost-book system, were until recently exclusively regulated by the unwritten code of rules constituting the cost-book custom.[11] However, at the present day,[12] the majority of such companies

[1] See De Castro's Case, 2 Jur. N. S. 1203.

[2] See Thomas *v.* Hobler, 4 De G. F. & J. 201, 204.

[3] Proc. in Stan. (1856), Introd. Not. 28, 29; Kittow *v.* Liskeard, L. R. 10 Q. B. 9. See Tapping, 27.

[4] Tredwen *v.* Bourne, 6 M. & W. 465, 466; Martyn *v.* Gray, 14 C. B. N. S. 842.

[5] Ricketts *v.* Bennett, 4 C. B. 701; Fenn's Case, 1 Sm. & G. 31; Kittow *v.* Liskeard, *u. s.*

[6] Curling *v.* Flight, 6 Ha. 45; 2 Ph. 614; Proc. in Stan. (1856), Int. Not. 23; Kittow *v.* Liskeard, *u. s.* Where a cost-book company possessed a committee of management and a secretary; and the latter had the custody of the books, subject to the order of the committee; and an action was brought by some of the members against the other members and the committee; but the secretary was not made a party; an order for inspection was made against one of the committee, although he alleged that he had no individual control over the secretary: see Chaffers *v.* Woolner, 30 L. T. 126.

[7] Curling *v.* Flight, *u. s.*; Kittow *v.* Liskeard, *u. s.*

[8] Proc. in Stan. (1856), Int. Not., 19.

[9] See Tippet *v.* Johns, Tapping, 187.

[10] Vivian *v.* Mowatt, 8 L. T. 480.

[11] See Bodmin United Mines, 23 Beav. 379; Cox's Case, 4 De G. J. & S. 55 n., 56n. See also Curling *v.* Flight, 2 Ph. 618.

[12] This, no doubt, explains the conflicting statements in Bodmin United Mines, *u. s.*, and Cox's Case, *u. s.*, and in Frank Mills Co., 23 Ch. D. 55, 56.

are worked according to expressly defined rules.[1] In some cases these rules are little more than an echo of the custom; and, where this is so, the companies are, of course, as strictly cost-book companies as if they were without a code. But, in others, the rules depart more or less from the custom; and, where this is so, the companies cannot properly be said to be cost-book companies at all.[2] Where rules exist, they should be entered in the cost-book, and signed by the members.[3] Indeed it is sometimes made obligatory on the members to sign them before they can become entitled to the privileges of membership. But notwithstanding such an obligation, a person may, without signing, be deemed to have become a member; and may be liable to creditors accordingly.[4]

Commencement of working in cost-book companies.

It has been said to be customary in companies, purporting to be worked on the cost-book system, in cases where a fixed capital has been agreed upon, to commence working as soon as all the capital has been subscribed for, although no instalment may have been received in respect of a considerable part of it.[5] However this may be, it is quite clear, that, where a fixed capital has been agreed upon, and the working has been commenced, and then abandoned, before a considerable portion of the capital has been subscribed for, an allottee is, *primâ facie*, entitled to recover back from the promoters the deposits which he may have paid.[6] But, of course, knowledge, followed by laches, may deprive him of his rights.[7] It need hardly be said, that where the prospectus of a cost-book company provides, that the capital shall not be less than a specified amount; and the rules provide, that, upon a fixed proportion being subscribed for, the working may be commenced; a member cannot escape from his position by alleging that the rules are inconsistent with the prospectus.[8]

[1] See Frank Mills Co., *u. s.*

[2] Bodmin United Mines, *u. s.*; Cox's Case, *u. s.* See Frank Mills Co., *u. s.*, 56.

[3] Tapping, 16.

[4] Hawkins' Case, 2 K. & J. 253; Bowen's Case, 4 W. R. 800. The existence of rules may sometimes relieve members from being bound by anything, which does not appear therein: see Thomas *v.* Hobler, 4 De G. F. & J. 199.

[5] Johnson *v.* Goslett, 3 C. B. N. S. 569, 577; affirming S. C., 18 C. B. 728. In strictness, a fixed capital is foreign to the nature of the cost-book system: *ante*, pp. 443, 444.

[6] Barstow *v.* Reynolds, 24 L. T. 83, 278; Johnson *v.* Goslett, *u. s.*

[7] Hawkins' Case, 2 K. & J. 253.

[8] *Ib.*; Richardson's case, 4 W. R. 670.

Fraud in origin of cost-book companies.

Where a cost-book company has its origin in fraud, and a member is thereby induced to contribute to it, he may recover damages for any injury sustained by him.[1] And he may have his contract to take shares altogether rescinded, and the money paid by him recovered, if he is in a position to return the shares in the same state as when he took them.[2] He cannot, however, have the latter remedy, if he has received dividends on the shares; or, if the company, having been originally unlimited, has been registered as a limited company. For, in such cases, his position, as respects a return of the shares, has been altered.[3] And a member, who alleges that the prospects of a cost-book undertaking were exaggerated by the directors, is not, of course, entitled to a remedy of any kind, if he has had as full an opportunity as the directors of ascertaining the real prospects.[4] And he may lose the remedy, to which he would otherwise be entitled, if he has failed to act with common prudence.[5] Where there is a substantial variation between the prospectus of a cost-book company and its rules; and a member has become such on the faith of the prospectus; and the company is wound up; there may be no right to place him on the list of contributories.[6]

Cost-book companies rateable; and may sue and be sued in cost-book name.

The members of a cost-book company may have a possession for rating purposes.[7] And there is no reason since the Jud. Acts why a cost-book company, although unincorporated, may not sue and be sued like any other partnership in the partnership name.[8]

[1] Clarke *v.* Dickson, E. B. & E. 148; Chester *v.* Spargo, 18 L. T. N. S. 314.

[2] Clarke *v.* Dickson, *u. s.*; Chester *v.* Spargo, *u. s.*

[3] Clarke *v.* Dickson, *u. s.*

[4] Jennings *v.* Broughton, 17 Beav. 234; 5 De G. M. & G. 126. The mine was a cost-book mine: see the report in 22 L. J. Ch. 587.

[5] Robson *v.* Devon, 3 Jur. N. S. 576; 4 *ib.* 245.

[6] See Richardson's Case, 4 W. R. 670. In an action against the directors of a cost-book company for misrepresentations in their prospectus, a book purporting to be a former cost-book of the company, and to contain accounts of disbursements, is not admissible in evidence, unless it be shown that it was, in fact, kept by the purser while he was acting as such: Shrewsbury *v.* Blount, 2 Man. & G. 475, 496; 2 Scott, N. R. 588.

[7] Kittow *v.* Liskeard, L. R. 10 Q. B. 7.

[8] See Escott *v.* Gray, 47 L. J. C. P. 606.

b. Registration.

A company (not being a cost-book company) engaged in working mines "within and subject to the Stannary jurisdiction,"[1] and consisting of seven or more members, may be registered under the Comp. Act, 1862.[2] Such a company, if existing at the commencement of the Act, may be registered as limited by shares, provided the members have previously agreed upon a fixed capital;[3] although only, it would appear, in such a case.[4] And, subject to this, every such company, whether existing at the commencement of the Act or formed subsequently, may be registered as unlimited, or as limited by shares, or as limited by guarantee.[5] Stannary company not being cost-book company.

A cost-book company (whether within or without the Stannary limits) is equally capable of registration. But it is essential, that, if intended to be limited by shares, it should not have existed at the commencement of the Act. For the agreement upon a fixed capital, which would in that case be necessary, would be a departure from the normal type of the cost-book system.[6] And if the members of a cost-book company formed after the commencement of the Act desire to register thereunder, they must, it would seem, contrary to the practice in many of such companies,[7] make it subject in some shape to a written code of rules.[8] Cost-book company.

It is, however, purely optional with the members of a company (whether cost-book or otherwise) engaged in working "within and subject to the Stannary jurisdiction,"[1] even if Registration optional in Stannary companies.

[1] See *ante*, p. 443.

[2] 25 & 26 Vict. c. 89. See, as to existing companies, and the formalities to be complied with before or upon registration, ss. 179, 180, 181, 183, 184, 186, 187, 190, 196; as to future companies, and the like formalities, ss. 14, *et seq.*

[3] Ss. 179, 181.

[4] *Ib.*; Lindley, 149, 150.

[5] Comp. Act, 1862, ss. 179, 180, 181.

[6] *Ante*, pp. 443, 444. Such an agreement was made in *Re* Appletreewick Co., 18 Eq. 95. As to the necessity, where such a registration takes place, of observing *uberrima fides* towards the public, see *ib.*

[7] *Ante*, pp. 444, 445.

[8] Companies formed after the commencement of the Act, and registering under it, must either possess a code of rules contained in formal articles of association, or must become subject to the regulations contained in Table A. of the Act: Comp. Act, 1862, ss. 14, 15. Of course, there is nothing to prevent the members of a cost-book company from converting it into a limited company. As to fraud in such a case, see Ambrose, &c., Co., 14 Ch. D. 390.

they consist of more than twenty persons, whether they will register or not. They are, whatever the number of their proprietary may be, exempted from the necessity for registration by an express provision of the Comp. Act, 1862.[1] And, as may be supposed, such companies in the great majority of cases take advantage of this provision, and avoid the inconvenient consequences of registration.

Effect of registration and winding-up on former cost-book member.

Where a member of a cost-book company ceases to be such; and the company afterwards is registered and wound up under the Comp. Act, 1862; he cannot be placed on the B. list of members, although he ceased to be a member within a year prior to the winding up. For the company cannot, by registering after he has ceased to be a member, alter his position.[2] He may, however, be made liable in an independent proceeding in respect of transactions prior to the time when he ceased to be a member.[3]

Registered office.

A company working within the Stannary limits, and registered under the Comp. Act, 1862, may have, and in many cases has, its registered office elsewhere than in Cornwall or Devon.[4]

c. Management.

Meetings of cost-book and Stannary companies—generally.

The purser or other agent of a cost-book company convenes meetings of the adventurers at fixed periods, usually every two or three months.[5] Except where it is otherwise necessary,[6] or is otherwise provided by the rules of any unregistered company working "within and subject to the Stannary jurisdiction,"[7] resolutions passed by a majority in value of the members present at a meeting in person or by proxy are, under a statutory provision, binding on the company.[8] Sometimes in such cases it

[1] S. 4.

[2] See Lofthouse's Case, 2 De .G & J. 69, a decision under one of the former Acts.

[3] See Welsh Potosi Co., 27 L. J. Ch. 311.

[4] See East Botallack, &c., Co., 34 Beav. 82; Penhale, &c., Co., 2 Ch. 399, 403. The Comp. Act, 1862, s. 174, empowered the Board of Trade to require, that the Registrar's office of the Vice-Warden's Court should be one of the offices for the registration of such a company.

[5] Kittow *v.* Liskeard, L. R. 10 Q. B. 9, 10.

[6] The cases where it is necessary will be noticed in subsequent parts of this chapter.

[7] See *ante*, p. 443.

[8] 32 & 33 Vict. c. 19, s. 4.

is necessary that a special notice should be given of the meeting. By this is meant seven clear days' notice.[1] And sometimes it is necessary that a resolution should be special. By this is meant a resolution passed at a meeting with special notice, and confirmed at a subsequent meeting with special notice, such subsequent meeting being held not less than fourteen days nor more than a month after the prior meeting.[2] Independently, however, of statute, a cost-book company (whether within or without the Stannaries) is, *primâ facie*, governed by a majority of shares, not of voices.[3] A single shareholder of an unregistered stannary company cannot constitute a meeting.[4]

Business transacted at meetings.

The accounts of any unregistered stannary company may, under a statutory provision, be audited at any meeting with special notice.[5] And, independently of statute, at the periodical meetings of a cost-book company (whether within or without the Stannaries), the accounts are passed and allowed; dividends declared and divided amongst the adventurers in proportion to their respective shares, if there is a credit balance; and calls made, if there is a debit balance.[6] Agents of the company are also, if necessary, appointed or removed thereat; and the general business and operations of the concern are discussed and considered, and any necessary orders and directions given with reference thereto.[7] Entries are made in the cost-book of the resolutions from time to time come to at the meetings of a cost-book company.[8]

Intervals between meetings.

In the intervals between the meetings the purser or other agent of a cost-book company orders goods for the concern, and acts generally for the adventurers.[9] He also keeps the accounts, and enters them in the cost-book.[10] And the purser or other

[1] S. 5.

[2] S. 6. As to service of notices, see s. 8.

[3] Tapping, 3, 66; Proc. in Stan. (1856), Int. Not. 23.

[4] Sharp *v.* Dawes, 2 Q. B. D. 26.

[5] 32 & 33 Vict. c. 19, s. 10.

[6] Curling *v.* Flight, 2 Ph. 614; Kittow *v.* Liskeard, L. R. 10 Q. B. 9, 10. See Watson *v.* Spratley, 10 Exch. 222, 225.

[7] Proc. in Stan. (1856), Int. Not. 22, 23; Kittow *v.* Liskeard, *u. s.* As to giving notice under the Met. Mines Reg. Act, 1872, of a change of purser, see *post*, Chap. XXIV., Sect. 9 (*a*).

[8] Proc. in Stan. (1856), Int. Not. 22; Kittow *v.* Liskeard, *u. s.* 10.

[9] Kittow *v.* Liskeard, *u. s.*, 9, 10.

[10] *Ib.* See also Marc *v.* Malachy, 1 M. & Cr. 560.

agent of every unregistered stannary company is under a statutory duty, once at least in every four months, to make true entries in the cost-book, or other books or papers of the company, of accounts showing the actual financial condition of the company at the end of the month last preceding the time of entry, including a statement of all credits, debts, and liabilities, and distinguishing the amount of calls paid and calls not paid; with accurate lists of all the members for the time being, with their respective addresses; and all other entries required to be made by the custom of the Stannaries, or the direction of the company.[1]

Register or list of members of Stannary companies.

The register of members, required to be kept by every registered stannary company,[2] must be kept at the registered office of the company; and every member is entitled to inspect it, and obtain a copy. And in case such inspection or copy is refused, the Vice-Warden may by order compel an immediate inspection.[3] And if a name is improperly entered or omitted in the register, the register may be summarily rectified by order of the Vice-Warden.[4] Moreover, any member or creditor of a cost-book company within the Stannaries may, although no suit be pending touching the mine or the members, obtain from the Vice-Warden an order for the production of a list of all the members for his inspection. And if such list is not produced, the Vice-Warden may declare that the company is not constituted on the cost-book system; and he may enforce the order by attachment within the Stannaries, or by causing the same to be made a rule of the High Court.[5]

Register of mortgages of Stannary companies.

Every limited stannary company is bound under penalties to keep a register of all mortgages and charges specifically affecting its property; to be open to inspection by any creditor or member. And if such inspection is refused, the Vice-Warden may by order compel an immediate inspection.[6]

[1] 32 & 33 Vict. c. 19, s. 9. The purser or other agent does not appear to be entitled, as such, to the exclusion of the other adventurers, to the custody of vouchers for payments, even prior to the passing of his accounts: see Attwood *v.* Ernest, 13 C. B. 890, 891, 892.

[2] Comp. Act, 1862, s. 25.

[3] S. 32.

[4] S. 35. See *ante*, pp. 422, 425.

[5] 18 & 19 Vict. c. 32, s. 22. See South Lady Bertha Co., 2 J. & H. 387.

[6] Comp. Act, 1862, s. 43. See, as to the construction of this sect., Native Iron Co., 2 Ch. D. 345; Smith's Case, 11 *ib.* 579.

Every unregistered stannary company is bound, if it has any written rules or regulations, whether it be a company existing at the commencement of the Stan. Act, 1869,[1] or formed after the passing of that Act, to file a true copy of them at the office of the registrar of the Vice-Warden's Court; to be subject to inspection by all applicants at reasonable times. And if it neglects to do so, any member or creditor may apply to the Vice-Warden for an order compelling it.[2] Filing of rules of Stannary companies.

Any unregistered stannary company may by special resolution,[3] passed by not less than three-fourths in value of the members present in person or by proxy, from time to time alter its rules, or make new or additional rules.[4] But such rules must not be inconsistent with the provisions of the Stan. Act, 1869;[5] or abrogate any special rules existing at the passing of that Act for the management of any company; or authorise the making of any special rule to enable a company existing at the passing of that Act to borrow money.[6] Rules of Stannary companies—additions and alterations.

SECT. 2.—ACCOUNT—CALLS AND CONTRIBUTION.

a. Account.

Any member of a cost-book company may obtain an account against the others; and without seeking a dissolution.[7] To every action for an account all the members should be parties;[8] unless they are so numerous, that it would be inconvenient to join them.[9] The remarks previously made,[10] as to the right of the mortgagee of one of several partners in an ordinary mining concern to obtain an account and foreclosure against the others, apply to cost-book mines.[11] Account in cost-book companies.

[1] 24th June, 1869.

[2] 32 & 33 Vict. c. 19, s. 9.

[3] See *ante*, p. 449.

[4] 32 & 33 Vict. c. 19, s. 7.

[5] 32 & 33 Vict. c. 19.

[6] S. 7.

[7] 18 & 19 Vict. c. 32, s. 6; Proc. in Stan. (1856), Int. Not. 25. Cf. the case of ordinary partnership, *ante*, p. 117.

[8] Sibley *v.* Minton, 27 L. J. Ch. 53; Cox *v.* Stephens, 11 W. R. 929, 930. In an action seeking that a partner may be ordered to transfer a particular share, an account may (without making the other partners parties) be had against him of the profits of that share: Marc *v.* Malachy, 1 M. & Cr. 559; Turner *v.* Hill, 11 Sim. 1; Turner *v.* Tyacke, *ib.* 16; Turner *v.* Borlase, *ib.* 17.

[9] See Hichens *v.* Congreve, 4 Russ. 562.

[10] *Ante*, p. 118.

[11] Watson *v.* Eales, 23 Beav. 294, 303 304.

b. Calls.

Validity of meeting.

It need hardly be said, that, to enable payment of a call to be enforced, the meeting at which it is made must be validly held.[1]

Stannary companies—statutory action, &c.

Where a call is made by the members of any unregistered company working "within and subject to the Stannary jurisdiction,"[2] and is not paid by the appointed time, it may, with interest and costs, be recovered by an action in any Court of law, in the name of the purser or other agent; whether such purser or other agent is a member of the company or not.[3] And a call may, at any meeting with special notice,[4] be made by any such company, for the purpose of defraying estimated expenses to be incurred within three months thereafter;[5] and, if unpaid, may be recovered in the same manner as a call for past expenses.[6] And any such company may, at the time of making a call, direct that discount, not exceeding £5 per cent., shall be allowed on punctual payment; and that interest at the same rate may be charged on amounts due on calls, and remaining unpaid.[7]

Cost-book companies—collusive creditor's action, &c.

These are, however, statutory provisions. Independently of statute,[8] the only legal remedy, which, in most cases, a cost-book company (whether within or without the Stannaries) has against a defaulter, is to induce some creditor to sue him.[9] Except under special circumstances,[10] there is, or prior to the Jud. Acts was, independently of statute, no direct legal remedy.[11] And in a case, where, by the rules of a cost-book company, it was provided, that "calls in arrear shall be considered to be debts due from the

[1] Moore *v.* Hammond, 6 B. & C. 456 (a case of a cost-book mine, although not so stated in the report); Sharp *v.* Dawes, 2 Q. B. D. 26.

[2] See *ante*, p. 443.

[3] 32 & 33 Vict. c. 19, s. 13. No county court within the Stannaries has jurisdiction where the sum sought to be recovered exceeds £50: *ib.* For what is necessary to be alleged and proved in such action, see *ib.* See Sharp *v.* Dawes, 2 Q. B. D. 26.

[4] See *ante*, 449.

[5] 32 & 33 Vict. c. 19, ss. 10, 11.

[6] S. 13.

[7] S. 12.

[8] The statute only applies to companies working within and subject to the Stannary jurisdiction, or within the cognizance of the Vice-Warden: see s. 3: see *ante*, p. 443.

[9] See Escott *v.* Gray, 47 L. J. C. P. 606.

[10] For an instance of which see Sedgwick *v.* Daniell, 2 H. & N. 319.

[11] Weekes *v.* Snell, 23 L. T. 224; Hybart *v.* Parker, 4 C. B. N. S. 209; Kittow *v.* Liskeard, L. R. 10 Q. B. 9. Cf. Wyld's Case, 1 Mac. & G. 1, 18, *et seq.*; Sibley *v.* Minton, 27 L. J. Ch. 53.

shareholders so in arrear to the purser;" and that, in an action by the purser to enforce payment, "the defendant shall not be at liberty to set up or plead a partnership with the purser as a defence;" it was held that the purser had no right to sue.[1] In cases, however, where the statute may be resorted to, a collusive action by a cost-book company in the name of a creditor will be stayed; although, if the defendant is in default as respects calls, he will be required to pay them as the price of the stay.[2] Indeed, even where the statute may not be resorted to, a collusive action may be stayed at the instance of a defaulter, upon payment of calls.[3] Independently of statute,[4] calls for prospective expenses seem to be unknown in cost-book companies.[5]

Cost-book companies—lien for non-payment.

A cost-book company has a lien on the shares of a member for non-payment of calls. And it may enforce such lien by the equitable remedy of sale; either as against the member himself, or as against his trustee in bankruptcy.[6]

Stannary companies—forfeiture.

And, on non-payment of any call in respect of shares in an unregistered company working "within and subject to the Stannary jurisdiction,"[7] the company has a statutory power to serve the defaulter with a notice, requiring him to pay, with or without interest, and any expenses which may have accrued by non-payment; and stating, that, in the event of non-payment in accordance with the notice, the share in respect of which the call was made will be liable to be forfeited.[8] And if the requisitions of the notice are not complied with, the share in question may, at any time afterwards before payment, be, under the same power, forfeited by a resolution passed at a meeting with special notice.[9]

[1] Hybart *v.* Parker; Hybart *v.* Evens, 4 C. B., *n. s.*, 209. Of course, where a creditor sues a defaulter, and a verdict for the amount of the call and costs is taken; and this amount is smaller than the amount of the debt owing to the creditor; the debt is not, as between the creditor and the company, extinguished: Wheal Ludcott, &c., Co., 17 W. R. 745; *nom.* Jackson's Case, 21 L. T. N. S. 67.

[2] Escott *v.* Gray, 47 L. J. C. P. 606.

[3] See Sibley *v.* Minton, 27 L. J. Ch. 353; Wheal Ludcott, &c., Co., *u. s.*, 746.

[4] See n. [8] on previous page.

[5] The contrary seems to have been stated in Newton *v.* Daly, 1 Fos. & F. 26. But see 32 & 33 Vict. c. 19, s. 11; and see Proc. in Stan. (1856), Int. Not. 24; Batten on Stan. Act, 1869, p. 34.

[6] Proc. in Stan. (1856), Int. Not. 25; Hart *v.* Clarke, 6 De G. M. & G. 249; Watson *v.* Eales, 23 Beav. 294, 302, 303.

[7] See *ante*, p. 443.

[8] 32 & 33 Vict. c. 19. s. 16.

[9] S. 17. See *ante*, p. 449.

Incidental provisions.

Any share so forfeited must be carried to an account, called "The Account of Forfeited Shares;" and it is deemed to be the property of the company, and may be disposed of as the company think fit; and any member may purchase it, if sold.[1] A statutory declaration by the purser or other agent, that the call was made, and notice given, and default and forfeiture made, is evidence of the facts therein contained as against all persons entitled to the share. And such declaration, and the receipt of the purser or other agent for the price of the share, if sold, constitute a good title to the share. The purchaser must be entered in the cost-book, or other books and papers of the company, as a member; and he is thereupon deemed the holder, discharged as against the company from calls due prior to the purchase. And he is not bound to see to the application of the purchase-money; nor is his title affected by any irregularity in the proceedings in reference to the sale.[2] Any member whose share is forfeited is nevertheless liable to pay all calls, interest, and expenses payable in respect of the same at the time of the forfeiture.[3]

Cost-book companies—forfeiture.

Independently of statute,[4] shares in a cost-book company cannot, unless the rules of the company contain an express provision to the contrary, be forfeited for non-payment of calls.[5] And, in all cases, the conditions, on which a forfeiture may take place, must be strictly pursued.[6]

c. Contribution.

Purser's suit.

A cost-book company, working "within and subject to the Stannary jurisdiction,"[7] may also maintain a customary suit known as a 'purser's suit,' in the name of the purser or other agent, against the defaulter, for a contribution to the expenses of the working; and, in default of payment, for a sale of the

[1] S. 18.

[2] S. 19. Cf., as to relinquished shares, *post*, p. 474.

[3] S. 20.

[4] The statute only applies to companies within and subject to the Stannary jurisdiction: see *ante*, p. 452, n. [8].

[5] Clarke *v.* Hart, 6 H. L. C. 633.

[6] *Ib.* See also Watson *v.* Eales, 23 Beav. 294, 302, 304; Rule *v.* Jewell, 18 Ch. D. 660, 662. Cf. Garden, &c., Co. *v.* McLister, 1 App. Cas. 39. Where a member's shares have been forfeited *bonâ fide*, he cannot be subsequently placed on the list of contributories in respect of them: Edwards' Case, 1 L. T. N. S. 399.

[7] See *ante*, p. 443.

defaulter's shares.[1] And if, upon the sale, the proceeds are insufficient to satisfy the debt, costs of action, and expenses of sale, the payment of the residue may be enforced in the same manner as other judgments for payment of money are enforceable.[2] But the only person, who can in general be made liable for contributions, is the person whose name appears in the cost-book as the owner. The purser cannot make a person liable on the mere ground, that he has agreed to become a member.[3]

Contribution in winding-up.

A member of an unregistered cost-book company, who is being sued by creditors, may, if the concern is insolvent, and he is not in arrear in respect of calls, obtain contribution from his co-adventurers through the medium of a winding-up order.[4] But an order will not be made where the applicant refuses to pay his calls, and the company is able to meet its pecuniary engagements.[5]

SECT. 3.—THIRD PARTIES—CONTRACT AND TORT.

a. Dealings on Credit.

Supplying creditor of cost-book

The customary right of the purser, or other agent of a cost-book company, to order goods on credit for the necessary purposes

[1] 6 & 7 Will. 4, c. 106, s. 18; 18 & 19 Vict. c. 32, s. 3; Ord. March, 1876, tit. Purs. and Cred. Suits, O. 10, r. 4. See, as to the procedure in Purs. Suits, *ante*, pp. 420, 421.

[2] 18 & 19 Vict. c. 32, s. 3: *ante*, p. 427.

[3] Tippet *v.* Johns, Tapping, 187. In Graves *v.* Cook (2 Jur. N. S. 475), the directors of a cost-book mine, wanting money to work it, entered into an agreement that they should each take 100 shares in it at £1 per share; and each of them, accordingly, gave his I.O.U. to the purser for £100. An action being brought on one of the I.O.U.'s, it was held, that this was evidence of an account stated between the purser and the defendant. For a case, in which an action by a purser against shareholders, as acceptors of a promissory note, was defended on the ground, that the purser had been a party to a composition deed executed by such shareholders, and had thereby released his claim, see Lanyon *v.* Davey, 11 M. & W. 218.

[4] See Pennant, &c., Co., 15 Jur. 1192; Bosworthon Co., 26 L. J. Ch. 612; Wheal Anne Co., 10 W. R. 330: S. C. 30 Beav. 601; Tretoil, &c., Co., 2 J. & H. 421; South Lady Bertha Co., *ib.* 376: decisions under the former Winding-up Acts. See also Welsh Potosi Co. 27 L. J. Ch. 311. An unregistered company was there registered: the registered company was wound up; and the unregistered company was subsequently wound up under an independent order: *ante*, p. 448.

[5] See Wyld's case, 1 Mac. & G. 1; 1 H. & T. 125; a decision under one of the former Acts.

company may, *primâ facie*, have action against member.

of the concern has been already stated.[1] It is on this ground well settled, that he has authority, *primâ facie*, to bind the members by dealings on credit; and that, accordingly, unless the company be registered under the Comp. Act, 1862, a supplying creditor may, *primâ facie*, bring an action against an individual member to enforce the obligation.[2]

Defences which will not prevail.

It is no defence to such an action, that the defendant has paid all calls or contributions, which were payable by him.[3] Nor is it any defence, that the goods in question were supplied since the date of the last transfer of shares in the company; that the purser had paid certain moneys to the plaintiff on account; that new members of cost-book companies cannot, *primâ facie*, be sued for debts incurred prior to the time when they join;[4] and that the plaintiff was not, therefore, entitled to appropriate the moneys in payment of goods supplied prior to the date of the last transfer.[5] And even, if a company purporting to be worked on the cost-book system is being carried on with a smaller amount of capital than the amount agreed on at the time of its formation, the defendant will not be free from liability, if he has acquiesced in that course of management.[6] Moreover, an express agreement made between the defendant and the manager or the other members, that the manager should not deal on credit;[7] or that the defendant should incur no liability;[8] will not, *primâ facie*, free the defendant from liability. And it need hardly be said, that, in such a case, the plaintiff's ignorance, at the time he supplies

[1] *Ante*, p. 444.

[2] Proc. in Stan. (1856), Int. Not. 23. See also Ellis *v.* Schmoeck, 5 Bing. 521; Tredwen *v.* Bourne, 6 M. & W. 461 (which, although not so stated in the reports, were cases of cost-book mines); Newton *v.* Daly, 1 Fos. & F. 26; Toll *v.* Lee, 4 Exch. 230; Northey *v.* Johnson, 19 L. T. 104; German Mining Co., 4 De G. M. & G. 40, 41; Peel *v.* Thomas, 15 C. B. 714; Lanyon *v.* Smith, 3 B. & S. 938; Harvey *v.* Clough, 8 L. T. N. S. 324; Martyn *v.* Gray, 14 C. B. N. S. 824, 842; Escott *v.* Gray, 47 L. J. C. P. 606, 607. The law is the same in the case of ordinary partnerships: see *ante*, p. 122.

[3] See Hawken *v.* Bourne, 8 M. & W. 703. In the judgment this was stated to be a case of a scrip mine, but a scrip mine is only another name for a cost-book mine: see *ante*, p. 443.

[4] As to which see *infra*, Sect. 4, *a*. (γ).

[5] Geake *v.* Jackson, 36 L. J. C. P. 108.

[6] Tredwen *v.* Bourne, *u. s.*; Hawkins' case, 2 K. & J. 253. Cf. as to ordinary partnerships, *ante*, p. 123.

[7] Hawken *v.* Bourne, *u. s.*

[8] Peel *v.* Thomas, *u. s.*

the goods, that the defendant is interested in the concern, is immaterial.[1]

If, however, the goods supplied are not necessary or usual in the working of the mine, the person by whom, or by whose authority, they are ordered is alone liable for their price.[2] And, of course, a person, who supplies goods to a cost-book mine, cannot make a member liable, if he has been previously informed that that member will decline responsibility.[3] And if, in any case, the plaintiff knows of the existence of an agreement between the manager and the defendant, that the manager should not deal on credit, he cannot make the defendant liable.[4] And such an agreement, although inoperative as between a defendant and a plaintiff without notice, will, of course, be good as between the defendant and the manager.[5]

Defences which may prevail.

In an action seeking to make a member of a cost-book company liable, it must, of course, be shown, that, at the time when the debt was contracted, his name was properly entered on the cost-book as a member; or, in some other way, shown, that he was in fact a member,[6] or had held himself out as such.[7] Although an admission made by him, that he is a member; or what amounts to an admission, such as the production of his signature to an agreement to purchase shares;[8] is a circumstance to be considered in estimating his liability;[9] if the admission be shown to have been made in error, it cannot have any effect.[10] And where by the rules of the company in question registration is necessary to constitute him a member; and he has executed an agreement to purchase shares; but he has not authorized his name to be registered; and his name has been

Membership must be shown.

[1] Hawken *v.* Bourne, 8 M. & W. 703.

[2] Tredwen *v.* Bourne, 6 M. & W. 461; Hawken *v.* Bourne, 8 *ib.* 703.

[3] Vice *v.* Fleming, 1 Y. & J. 227.

[4] Hawken *v.* Bourne, *u. s.*

[5] *Ib.*

[6] Northey *v.* Johnson, 19 L. T. 104; Peel *v.* Thomas, 15 C. B. 714; King's Case, 6 Ch. 203.

[7] Northey *v.* Johnson, *u. s.*; Thomas *v.* Clark, 18 C. B. 662; Martyn *v.* Gray, 14 C. B. N. S. 824. The defendant, in the latter case, informed the captain of the mine, or did acts which led the captain to believe, that he was a member: the captain informed the plaintiff; and the plaintiff supplied the goods: the defendant was held liable.

[8] Toll *v.* Lee, 4 Exch. 230.

[9] Ralph *v.* Harvey, Richards *v.* Harvey, 1 Q. B. 845; cases of cost-book mines, although not so stated in the reports.

[10] Vice *v.* Anson, 7 B. & C. 409. See Bodmin United Mines, 23 Beav. 384, 385.

registered without his authority; he cannot be made liable; unless credit be shown to have been given on the faith of the registration.[1] And for these purposes there was never any more extensive remedy in equity than at law.[2] However, it is sufficient *primâ facie* evidence to prove a person to be a member of a cost-book company, that, in letters written by him, he has admitted that such is the fact;[3] or, even that he has attended meetings of the proprietors.[4]

Not necessary to show freehold conveyance to member.

In order to make a defendant liable, it is not necessary to show that a freehold interest in the mine in question has been conveyed to him; such conveyance being seldom, if ever, in fact made.[5] There are, no doubt, dicta to the contrary in *Vice* v. *Anson*;[6] and the case itself seems, at first sight, to be a decision to the contrary; but the facts were simply as follows:— An action was brought against the defendant for goods supplied for the use of a cost-book mine, in which it was alleged that the defendant was a partner. The single fact relied on in support of the allegation was that she had a legal interest in the mine; and, by way of proving this, it was in evidence, that she had admitted being a shareholder, and that she was in possession of certificates of shares. It was, however, also in evidence, that her admission was made under the false impression, that she had a legal interest in the mine; and it was not shown that the certificates had been issued by any competent authority. There was no other connection between the defendant and the mine than the supposed legal interest which she had; and, this interest not having been proved, it was held that the action was not maintainable.[7] At all events, if *Vice* v. *Anson* may be considered to have decided, that a person cannot be a shareholder in a cost-book mine without having a legal interest in it, it cannot be sustained.[8]

[1] Thomas *v.* Clark, 18 C. B. 662, 672. Cf. Hawkins' case, 2 K. & J. 253.

[2] See King's case, 6 Ch. 203.

[3] Harvey *v.* Kay, 9 B. & C. 356; which, although not so stated in the report, was a case of a cost-book mine.

[4] Ellis *v.* Schmoeck, 5 Bing. 521. As to the difference between an actual and an inchoate partnership, see Fox *v.* Frith, 10 M. & W. 131. Cf. as to ordinary partnerships, *ante*, p. 123.

[5] *Ante*, p. 443. Cf. Curling *v.* Flight, 2 Ph. 613, 617.

[6] 7 B. & C. 409, 411. Cf. Dickinson *v.* Valpy, 10 B. & C. 128; 5 Man. & Ry. 126.

[7] See the observations on this case in Owen *v.* Van Uster, 10 C. B. 318, 323, 324, 325, 326.

[8] See Steigenberger *v.* Carr, 3 M. &

Commencement and end of membership.

A person, who pays a deposit on shares, and afterwards signs a partnership deed, is considered a member from the time of paying the deposit.[1] And a defendant cannot escape liability on the ground, that, although he was a member during the time that the goods in question were supplied, he subsequently ceased to be so; that, after he had so ceased, the company (which had previously been unregistered) was registered; and that an order has been made for winding up the registered company, and for staying all proceedings against it. For he never became a member of the registered company.[2]

Evidence of supply.

The proof of an order by the purser to supply goods; general evidence of the supply of goods of the kind in question; and the production of accounts, specifying the amount supplied, submitted by the purser to the managing committee, and passed by the latter; are *primâ facie* evidence that goods to the amount stated were in fact supplied.[3]

Creditor's suit.

A supplying creditor of a cost-book company, working 'within and subject to the Stannary jurisdiction,'[4] has, in addition to his remedy by ordinary action, a customary lien on the ores, machinery, and materials in or about the mine or fraudulently removed therefrom. And he has a right to enforce such lien by a customary suit, known as a 'creditors' suit,' against the purser or other agent, or against one or more of the adventurers; asking, in default of payment, for the sale of such ores, machinery, and materials, and the distribution of the proceeds *pari passu* between himself and the other creditors generally.[5] If the proceeds of sale are insufficient to satisfy the debts, the

G. 191; 3 Scott, N. R. 466; Vivian *v.* Mowatt, 8 L. T. 480.

[1] Lawler *v.* Kershaw, 1 M. & M. 93; which, although not so stated in the report, was a case of a cost-book mine. It was in the same case questioned, whether the mere payment of the deposit, without the subsequent signature, would have made the defendant a partner.

[2] Lanyon *v.* Smith, 3 B. & S. 938; Harvey *v.* Clough, 8 L. T. N. S. 324. The registration was under the repealed Act, 21 & 22 Vict. c. 60.

[3] Geake *v.* Jackson, 36 L. J. C. P. 108.

[4] See *ante*, p. 443.

[5] See Proc. in Stan. (1856), Int. Not. 25; Batten on Stan. Act, 1869, 11, 12; 6 & 7 Will. 4, c. 106, s. 18; 18 & 19 Vict. c. 32, s. 5; 32 & 33 Vict. c. 19, s. 24; Turner *v.* Hill, 11 Sim. 1; Turner *v.* Borlase, *ib.* 18, 19; Cox's Case, 4 De G. J. & S. 56 n. See, as to the procedure in Cred Suits, *ante*, pp. 420, 421. Where the petitioner is also a member, he is not entitled to payment until all the creditors, not being members, are paid in full: Ord. March, 1876, tit. Purs. and Cred. Suits, O. 16, r. 11.

unsatisfied part will be apportioned rateably amongst all the members according to the number of their shares; who are liable to pay the same accordingly. And, for the purpose of ascertaining who the members are, the registrar may call for and enforce production of the cost-book and all other papers and documents of the mine; and examine the purser or other agent. And if such members refuse payment, it may be enforced in the same manner as other judgments for payment of money are enforceable.[1]

Duke of Cornwall.

Persons, on whose lands the Duke of Cornwall enters under the Act 7 & 8 Vict. c. 105, and who are entitled to compensation and costs in respect thereof, may exercise all the privileges of a mining creditor in respect of the mines in question.[2]

b. Borrowing Money.

Purser or agent or member of cost-book company cannot, *primâ facie*, bind by borrowing money.

The *primâ facie* power of the purser or other agent of a cost-book company to bind the members is limited to dealings on credit for the necessary purposes of the concern. Cost-book companies are carried on by means of ready money from time to time supplied by the members;[3] and are notoriously so carried on. And, this being so, the purser or other agent[4] has no authority, *primâ facie*, to bind the members; and, *à fortiori*, no member[5] has authority, *primâ facie*, to bind the other members; by borrowing money on their credit.[6] And the fact, that the necessity for the borrowing was of the most pressing kind, seems immaterial. Thus, in *Hawtayne* v. *Bourne*,[7] a lenders' action was unsuccessful; although the money had been borrowed for the purpose of paying their wages to labourers, who, in consequence of non-payment, had obtained warrants of distress on the materials belonging to the mine.[8] However, the authority in question may, it would seem, be acquired by the agreement

[1] 18 & 19 Vict. c. 32, s. 5: Ord. March, 1876, tit. Purs. and Cred. Suits, O. 16, r. 13: see *ante*, p. 427. See, as to interpleader, *ante*, p. 421.

[2] S. 65. See *ante*, p. 279.

[3] *Ante*, p. 444.

[4] Ricketts *v.* Bennett, 4 C. B. 686.

[5] See *ib.* See, as to ordinary partnerships, *ante*, pp. 123, 124.

[6] Proc. in Stan. (1856). Int. Not. 23.

[7] 7 M. & W. 595; a case of a cost-book mine, although not so stated in the report.

[8] See also German Mining Co., 4 De G. M. & G. 40, 41.

or acquiescence of those sought to be bound.[1] And if the person who borrows duly applies the loan for the necessary purposes of the concern, and is subsequently made liable by the lender for the amount, he is entitled to be reimbursed by the concern.[2]

c. *Negotiable Instruments.*

And, *à fortiori*, cannot in respect of negotiable instruments.

A fortiori the purser or other agent of a cost-book company has no authority, *primâ facie*, to bind the members; nor has any member authority, *primâ facie*, to bind the other members; by drawing or making or accepting or indorsing bills of exchange or promissory notes.[3] In *Dickinson* v. *Valpy*,[4] where an unsuccessful action upon a bill drawn and accepted by a cost-book mining concern was brought against one of the members, the following observations were made upon this subject:—"In the case of an ordinary trading partnership the law implies that one partner has authority to bind another by drawing and accepting bills; but it does not follow that it is necessary for the purpose of carrying on the business of a mining company. One of several persons jointly interested in a farm has no power to bind the others by drawing or accepting bills, because it is not necessary, for the purposes of carrying on the farming business, that bills should be drawn or accepted. Besides this is in form a bill of exchange drawn by the company on themselves. It is, therefore, in effect, a promissory note. I think it would require more evidence to show, that the directors of such a company had power to bind the other members by promissory notes than by bills of exchange."[5] In such cases the person, who draws or makes or accepts or indorses a bill of exchange, or a promissory note, is alone liable.[6] And even, where a bill is accepted by a purser, not in his individual capacity, but by procuration for the company, the purser, if a member of the company, is personally liable.[7] Of course, however, the power to bind the member in

[1] See and consider Sedgwick's Case, 2 Jur. N. S. 949.

[2] See *ib.* See Proc. in Stan. (1856), Int. Not. 24.

[3] Brown *v.* Byers, 16 M. & W. 252; a case of a cost-book mine, although not, in terms, so stated in the report.

[4] 10 B. & C. 128.

[5] Pp. 138, 139, *per* Littledale, J.

[6] Dickinson *v.* Valpy, 10 B. & C. 128; Mare *v.* Charles, 5 E. & B. 978.

[7] Nicholls *v.* Diamond, 9 Exch. 154. Cf. as to ordinary partnerships, *ante*, p. 125.

question may be shown to exist. And if his conduct amounts to a representation that he has authorised the transaction, he may be liable.[1]

d. Creditors of Individual Members.

Creditors of individual members of cost-book companies.

If judgment is recovered against a member of a cost-book company in Cornwall for a private debt; and a *fi. fa.* upon such judgment is delivered to the sheriff; and the company has not been registered under the Comp. Act, 1862; the sheriff may, apparently, seize the property of the company, and sell the share and interest therein of the judgment debtor in the ordinary way. For the company is not, apparently, a public company within the meaning of the Act 1 & 2 Vict. c. 110.[2] On similar grounds shares in a cost-book mine are not, apparently, liable to be charged with a judgment debt under section 14 of the same Act.[3] It seems doubtful, whether shares in a cost-book mine can be attached in the Lord Mayor's Court.[4]

e. Tort.

Tort by cost-book company.

Any member of a cost-book company may be sued for a nuisance occasioned by the working of the mine.[5] Where, however, a plaintiff obtained a verdict and judgment in such an action, and afterwards obtained a rule *nisi* for an injunction, the Court discharged the rule; it appearing, that the defendant had *bonâ fide* sold his shares before he had received notice of the application for the injunction.[6]

[1] Dickinson *v.* Valpy, 10 B. & C. 128.

[2] See Lindley, 696.

[3] The point was treated as doubtful in Nicholls *v.* Rosewarne, 6 C. B. N. S. 480.

[4] See Tredinnick *v.* Oliver, 5 H. & N. 780.

[5] See Matthews *v.* King, 3 H. & C. 910.

[6] *Ib.*

SECT. 4.—TRANSFER, RELINQUISHMENT, AND DEVOLUTION.

a. Transfer.

(*a*) *Powers.*

Power to transfer shares in cost-book and stannary companies.

Any member of a cost-book company, whether registered under the Comp. Act, 1862, or not, may transfer his share or shares without the consent of the other members; and may insist upon his transferee being accepted as a member in his place. And such transfer will not operate to dissolve the company.[1] An unregistered company, working 'within and subject to the Stannary jurisdiction,'[2] need not, however, recognise the transfer of a fractional part of a share.[3]

(β) *Contracts—Generally.*

Cost-book companies—4th sect. of Statute of Frauds—lease.

Where a cost-book mine is held upon lease by one of the members in trust for the individual members in proportion to their shares, the interest of each member includes an interest in the land itself, as well as in the profits of its employment.[4] And, so far as it is an interest in land, a contract for the transfer of it must be in writing signed by the party to be charged, pursuant to the 4th section of the Statute of Frauds.[5] But, where a cost-book mine is held upon lease by one of the members in trust for the undertaking generally, and not for the individual members in proportion to their shares, the share of each member includes neither land, nor an interest in land, within the 4th section of the Statute of Frauds.[6] Where, however, a lease of land is granted for the purposes of a cost-book company, no trust is, except in very rare cases, formally declared in favour of

[1] Ricketts *v.* Bennett, 4 C. B. 692; Watson *v.* Spratley, 10 Exch. 222, 235; Clarke *v.* Hart, 6 H. L. C. 649; Libri's Case, 30 L. T. 186; Lofthouse's Case, 2 De G. & J. 73; Nicholls *v.* Rosewarne, 6 C. B. N. S. 489; Cox's Case 4 De G. J. & S. 55 n.; Proc. in Stan. (1856), Int. Not. 24; Kittow *v.* Liskeard, L. R. 10 Q. B. 10, 16. Cf. as to ordinary mining partnerships, *ante*, pp. 137, 138.

[2] See *ante*, p. 443.

[3] 32 & 33 Vict. c. 19, s. 15.

[4] See Watson *v.* Spratley, *u. s.* 246.

[5] *Ib.*

[6] *Ib.*; Powell *v.* Jessopp, 18 C. B. 336; Walker *v.* Bartlett, *ib.* 845, 859. See *ante*, pp. 184, 185, where the reasons for this distinction are stated.

the members.[1] The interest, therefore, in the great majority of cases, of each member (even where a lease, as distinguished from a license, is granted), does not include any interest in the land; but is exclusively an interest in the profits of its employment, and in the tackle and machinery upon the land. In such cases a contract for the transfer of his interest by a member is not governed by the 4th section of the Statute of Frauds;[2] and, in so far as *Vice* v. *Anson*[3] (the facts of which have been already stated[4]) contains dicta to the contrary, it cannot be considered law.[5] Where a license, as distinguished from a lease, is granted for the purposes of a cost-book company, it seems immaterial, so far as regards the 4th section of the Statute of Frauds, whether the license is held on trust for the undertaking generally, or for the members in proportion to their shares; or whether there has been no expression of trust whatever. In none of these cases has a member any property in the mine. He has merely a property in the ore, when, and not before, it is won from the mine. That is to say, his interest is purely a chattel interest;[6] and a contract for the transfer of such interest does not accordingly seem to be within the 4th section of the Statute of Frauds.[7] In the absence of evidence to the contrary, there is a presumption that shares in a cost-book mine are not an interest in land.[8]

License.

17th sect.

A contract to transfer shares in a cost-book mine is not a contract for the sale of goods, wares and merchandize within the 17th section of the Statute of Frauds.[9]

Parol contract generally good.

Accordingly a contract to transfer shares in a cost-book mine is, except in the rare cases where the vendor has an interest in the land itself, good, although entered into by parol.[10]

[1] *Ante*, p. 443.

[2] Watson *v.* Spratley, 10 Exch. 222.

[3] 7 B. & C. 409.

[4] *Ante*, p. 458.

[5] See Curling *v.* Flight, 2 Ph. 613, 617.

[6] See Walker *v.* Bartlett, 18 C. B. 845, 859; Hayter *v.* Tucker, 4 K. & J. 247. See, as to mining licenses, *ante*, pp. 249, *et seq.*

[7] See and consider Watson *v.* Spratley, 10 Exch. 222. See also Walker *v.* Bartlett, *u. s.*

[8] See Powell *v.* Jessopp, 18 C. B. 336; Hayter *v.* Tucker, *u. s.*, 246.

[9] Watson *v.* Spratley, *u. s.* Cf. Pickering *v.* Appleby, 1 Com. 353.

[10] Watson *v.* Spratley. *u. s.* See also Toll *v.* Lee, 4 Exch. 230; Northey *v.* Johnson, 19 L. T. 104; Kittow *v.* Liskeard, L. R. 10 Q. B. 10. See Toppin *v.* Lomas, 16 C. B. 161. This proposition does not appear to be subject to any qualification; and there do not appear to be any grounds for the

Usual mode of contracting.

However, the usual mode of contracting for the sale and purchase of an interest in a cost-book mine is either through the medium of a mining broker;[1] or by each party making a memorandum of the sale in his own book, in the same way as brokers or jobbers do on the stock exchange.[2]

Cost-book companies—abstract of title.

A purchaser of shares in a cost-book company is not, unless where the vendor has an interest in the land itself, entitled to a regular abstract of title to the mine.[3] But he is entitled to such evidence of the constitution of the company, and of the nature of the title under which the mine is worked, as will show, that the subject-matter of the purchase is what it professes to be, and that the proposed form of transfer will give him a valid title to the shares.[4]

Delivery and payment.

In an action for not accepting shares in a cost-book mine, evidence is admissible of an usage among brokers in such shares, that, in contracts for their sale and purchase, the delivery takes place at the time appointed for payment, and that the purchaser cannot demand delivery before that time.[5]

Fraud—rescission.

Where a number of shares in one cost-book mine have been purchased on the faith of untrue representations by the vendor; and the purchaser has subsequently parted with a portion of them; he is entitled to rescind the sale as regards the portion which he has retained. For those parted with and those retained fluctuate in value together.[6] But a sale in one transaction of several kinds of shares will not be set aside for misrepresentation, unless the person seeking relief is able to restore all the shares which he has purchased. For some may become profitable, and others worthless.[7] Where a plaintiff is entitled to have a sale of shares rescinded, he is not, in order to preserve his right, obliged, after he issues his writ, to pay calls on them. And, if they are forfeited for non-payment of such calls, the

doubts expressed by Erle, J., in Northey *v.* Johnson, 19 L. T. 104.

[1] See Field *v.* Lelean, 6 H. & N. 617.

[2] See Watson *v.* Spratley, 10 Exch. 222, 234.

[3] Curling *v.* Flight, 2 Ph. 613, 617, 618.

[4] *Ib.*

[5] Field *v.* Lelean, *u. s.*

[6] Maturin *v.* Tredennick, 12 W. R. 740.

[7] *Ib.* Cf. the law, where a member of a cost-book company has been induced to join through fraud by the promoters, *ante*, p. 446.

loss must; at all events if the defendant knows of their having been made; fall upon the latter.[1]

(γ) *Completion—Special Contracts.*

Cost-book companies—parol transfer generally good.

Usual mode of transfer—substitution of names in cost-book

It appears to be competent, *primâ facie*, in the great majority of cases, for a member of a cost-book company to transfer, as it is competent for him to agree to transfer, his interest by parol.[2] However, the general mode of effecting a transfer is by the purser or other agent substituting the name of the transferee for that of the transferor in the cost-book; his authority for that purpose being either the deposit in the company's office of a formal deed of assignment; or, more commonly, a written or verbal direction to the purser or other agent from the transferor, and a written or verbal acceptance of the shares by the transferee.[3] In general, each party to a transfer may, by an action for specific performance, compel the other to concur in procuring the substitution of names to be made; and he may recover for any injury sustained by the default of the other in that respect.[4] But, of course, fraud or concealment may be a bar to any such action.[5] If, on a sale being effected, a written direction is given to the purser or other agent to substitute the name of the transferee for that of the transferor; and a blank is left for the name of the transferee; the vendee is not bound to procure his own name to be registered.[6] But, if, before he procures some name to be registered, a call is made on the vendor, the vendee is bound to indemnify him in respect of it.[7]

Stamps.

A registered transfer of shares in a cost-book company may, it seems, be effectual without a stamp.[8] But any request or

[1] Maturin *v.* Tredennick, 12 W. R. 740. For the form of the order, see p. 742.

[2] See Watson *v.* Spratley, 10 Exch. 222. See also Toll *v.* Lee, 4 Exch. 230; Northey *v.* Johnson, 19 L. T. 104; Kittow *v.* Liskeard, L. R. 10 Q. B. 10; *ante*, p. 464.

[3] See Marc *v.* Malachy, 1 M. & Cr. 560; Curling *v.* Flight, 6 Ha. 45; 2 Ph. 614; Toll *v.* Lee, *u. s.*, 230; Watson *v.* Spratley, *u. s.*, 222, 225, 226; Powell *v.* Jessopp, 18 C. B. 338, 339; Walker *v.* Bartlett, *ib.* 845; Lofthouse's Case, 2 De G. & J. 71, 72; Watson *v.* Eales, 23 Beav. 296; Nicholls *v.* Rosewarne, 6 C. B. N. S. 480. See also Proc. in Stan. (1856), Int. Not. 24; Kittow *v.* Liskeard, *u. s.* Cf. Northey *v.* Johnson, *u. s.*

[4] Tippet *v.* Johns, Tapping, 187; Proc. in Stan. (1856), Int. Not. 25.

[5] De Castro's Case, 2 Jur. N. S. 1203.

[6] Walker *v.* Bartlett, 18 C. B. 845.

[7] *Ib.*

[8] See Toll *v.* Lee, 4 Exch. 230. Cf. Walker *v.* Bartlett, 18 C. B. 845.

authority to the purser or other agent of a cost-book company to enter or register any transfer of a share, or part of a share; or any notice to such purser or agent of any such transfer; must have a sixpenny stamp.[1] And non-compliance with this obligation entails a penalty of £20.[2]

Entry in cost-book is *primâ facie* evidence of transfer.

Although cost-book shares cannot be disposed of by the mere entry of a transfer,[3] an entry by the purser or other agent is, in all cases, as between the members themselves, *primâ facie* evidence of a transfer having been made.[4]

Commencement of liability and benefits.

As between the transferor and the transferee the consequences of not procuring the substitution of names are immaterial.[5] Indeed it has been decided, that a proviso, that no transfer shall be complete unless entered in the cost-book, and acknowledged by the purser, is nothing more than form.[6] The consequences with respect to the company or its creditors may, however, be serious. For the registered owner is alone liable, *primâ facie*, in respect as well of calls or contributions, as of claims by creditors;[7] and he may alone be liable to be placed on the list of contributories.[8] He may, on the other hand, be alone entitled to the benefits of membership.[9] *Primâ facie*, therefore, the transferor becomes free from all liability, and becomes disentitled to all benefit, in respect of future transactions as soon as he has procured his transferee's name to be registered.[10] Conversely, a transferee, is not liable, *primâ facie*, either to the company, or to his transferor, or to creditors, for

[1] 33 & 34 Vict. c. 97, s. 128; Sch. "Transfer."

[2] 33 & 34 Vict. c. 97, s. 128.

[3] Curling *v.* Flight, 6 Ha. 46; 2 Ph. 613, 618.

[4] Reynolds *v.* Bassett, cited in Tapping, 49; Curling *v.* Flight, *u. s.*

[5] See Walker *v.* Bartlett, 18 C. B. 845.

[6] See Mayhew's Case, 5 De G. M. & G. 537, 546.

[7] See Tippet *v.* Johns, Tapping, 187; *ante*, p. 457.

[8] See Humby's case, 28 L. J. Ch. 875. Cf. De Castro's Case, 2 Jur. N. S. 1203.

[9] The rules of many companies provide that a transferee shall not be treated as a member until his name is registered: see Mayhew's Case, 5 De G. M. & G. 537, 546; Thomas *v.* Clark, 18 C. B. 662; Humby's Case, 28 L. J. Ch. 875.

[10] Libri's Case, 30 L. T. 186; South Lady Bertha Co., 2 J. & H. 388; Lanyon *v.* Smith, 3 B. & S. 945; Cox's Case, 4 De G. J. & S. 55 n. See Northey *v.* Johnson, 19 L. T. 204. As respects creditors, however, he must not continue to hold himself out as a member. Non-registration may also sometimes produce serious consequences with respect to creditors of the individual members: see Nicholls *v.* Rosewarne, 6 C. B. N. S. 480; *ante*, p. 462.

calls or contributions, or debts, which ought to have been paid by the transferor.[1] Nor, on his refusal to pay such calls or contributions, can the company declare his shares to be forfeited.[2]

Special contracts.

However, the *primâ facie* position of parties may be altered by agreement or conduct at or subsequently to a transfer of shares. A transferee may agree to become liable in respect of past transactions; or he may so conduct himself as to recognize or adopt them.[3] And where the form of transfer of shares in a cost-book company gave to the transferee the transferor's interest in all moneys in hand, and in everything whatever connected with the concern; and provided, that the transferee should hold on the same conditions as his transferor had held; and a member transferred his shares in that form; it was held, that, as between the transferee and his transferor and the other members, the liability of the transferee could not be limited to the time from which he took the transfer.[4] Indeed it has been said, that wherever partnership articles provide, that a partner may transfer his shares, they mean that he may so transfer them as to put the transferee in his place as to antecedent liability.[5] A transferee may also, in respect of claims by creditors, be indirectly affected by past transactions; in consequence of the lien, which supplying creditors may enforce on the machinery and materials for the time being belonging to the company.[6] On the other hand, as in the case of a transfer by way of mortgage, the transferor may agree to indemnify the transferee in respect of future transactions.[7]

[1] Thomas *v.* Clark, 18 C. B. 662; Watson *v.* Eales, 23 Beav. 294, 302; Lanyon *v.* Smith, 3 B. & S. 945; Cox's Case, 4 De G. J. & S. 55, n.

[2] Watson *v.* Eales, *u. s.* The fact, that the transferee is only the mortgagee of the shares, is immaterial, *ib.*

[3] Cox's Case, 4 De G. J. & S. 55 n.

[4] Mayhew's Case, 5 De G. M. & G. 837. Cf. Fenn's Case, 4 *ib.* 285, 294. It need hardly be said, that no such provision can affect the rights of third parties: see Mayhew's Case, *u. s.*, 849.

[5] See Mayhew's Case, *u. s.*, *per* Lord Cranworth: see also Taylor *v.* Ifill, 8 L. T. N. S. 148. The rule is not affected by the circumstance that the transferor may himself have been one of the creditors: Taylor *v.* Ifill. *u. s.*

[6] Cox's Case. *u. s.*, 56 n.; Geake *v.* Jackson, 36 L. J. C. P. 109; *ante*, p. 459.

[7] See Betteley *v.* Stainsby, L. R. 2 C. P. 568; where to an action on such an agreement there was an unsuccessful plea of bankruptcy under the Act of 1849. Cf. special contracts in the case of Relinquishment, *infra b*, (*β*).

A transferor and a transferee cannot both be made contributories in respect of the same shares.[1] Both parties not liable.

(δ) *Inoperative Transfers—Frauds upon Third Parties.*

An unregistered cost-book company, working "within and subject to the stannary jurisdiction,"[2] need not recognize a transfer of a share until all calls made in respect of it, with interest and expenses, have been paid.[3] Stannary companies—inoperative transfers.

A transfer of shares in a stannary company made for the purpose of getting rid of the further liability of the shareholder, as such, for a nominal or no consideration, or to a person without any apparent pecuniary ability to pay the reasonable expenses of working the mine, or to a person in the menial or domestic service of the transferor, is fraudulent; and need not be recognized by the company, or by the Court on the winding-up of the company, whether the company is registered or unregistered.[4] Assuming, however, that a particular transfer is fraudulent, on the ground that the transferee is insolvent; if it has been acted on and recognized by the company, with knowledge of the insolvency; it cannot be set aside in the winding-up; nor can the name of the transferor be put on the list of contributories.[5] And where a person not already a member purchases shares in a cost-book company in the name of a nominee; and does so either to prevent its being known that he is trafficking in shares of the company, or even (it seems) to escape liability; he cannot be made a contributory.[6] If, in order to delude the public into an exaggerated estimate of the number of shares in a cost-book company, a person procures some shares of which he is the owner to be transferred into and registered in the names of mere nominees for him, he may, in the event of the company Frauds upon third parties.

[1] See Bowen's Case, 1 W. R. 800. As to giving notice under the Met. Mines Reg. Act, 1872, of a change of members, see *post*, Chap. XXIV., Sect. 9, (a).

[2] See *ante*, p. 443.

[3] 32 & 33 Vict. c. 19. s. 14.

[4] S. 35.

[5] Clynoweth's Case, 15 Ch. D. 13. See also Lofthouse's Case, 2 De G. & J. 69, 73, 74.

[6] King's Case, 6 Ch. 196.

being wound up, be made a contributory in respect of such shares.[1]

b. Relinquishment.

(*a*) *Powers.*

Power to relinquish shares in cost-book and stannary companies.

A member of a cost-book company may, if he pleases, relinquish his shares to the company, and insist upon the company accepting them.[2] An unregistered company, working "within and subject to the stannary jurisdiction,"[3] is not, however, bound to recognize the relinquishment of a fractional part of a share.[4]

(β) *Notice to Purser—Account and Payment—Special Contracts.*

Stannary companies—notice to purser.

A relinquishment of a share in an unregistered stannary company must be made by notice in writing delivered to the purser or other agent.[5]

Cost-book companies—right of and liability to account.

A member relinquishing his shares is entitled, *primâ facie*, to have an account taken of the assets, effects, and liabilities of the company; and, if the account shows a credit balance in favour of the company, his share of that balance becomes a debt due to him from the company. He is, on the other hand, subject, *primâ facie*, to have a like account taken against him; and, if it shows a debit balance, his share becomes a debt due from him to the company.[6] In other words, if the concern is insolvent, he is, *primâ facie*, liable to pay his share of the deficiency as if it were being wound up; but if it is solvent, he is, *primâ facie*, entitled to receive his share of the surplus.[7] His own previous indebtedness (if any) to the company is then

[1] Cox's Case, 4 De G. J. & S. 53. Whether the nominees ought not also to be on the list, *qu.*: *ib.*

[2] See Proc. in Stan. (1856), Int. Not. 24. See also Northey *v.* Johnson, 19 L. T. 104; Fenn's Case, 4 De G. M. & G. 293; Watson *v.* Spratley, 10 Exch. 222, 226; Bodmin United Mines, 23 Beav. 370, 379; Birch's Case, 2 De G. & J. 10; Birch's Case, 28 L. J. Ch. 894; Cox's Case, 4 De G. J. & S. 55 n.; Palmer's Case, 7 Ch. 286; Kittow *v.* Liskeard, L. R. 10 Q. B. 10; Frank Mills Co., 23 Ch. D. 55.

[3] See *ante*, p. 443.

[4] 32 & 33 Vict. c. 19, s. 22.

[5] *Ib.*

[6] See Batten on Stan. Act, 1869, 46; Fenn's Case, *u. s.*; Watson *v.* Spratley, *u. s.*; Edward's Case, 1 L. T. N. S. 399; Cox's Case, *u. s.*; Palmer's Case, *u. s.*

[7] See Frank Mills Co., 23 Ch. D. 55, *per* Jessel, M.R.

estimated; and is either deducted from the debt due to him, or is added to that due by him. [1]

Mode in which account taken.

For the purpose of taking the account, two valuers are appointed, one for the company, and the other for the relinquishing member; unless one is agreed upon for both.[2] The account is taken, not as from the time when it is made out, but as from the date of the notice of relinquishment.[3] And, in the absence of agreement to the contrary, it is taken on the following principle:—In taking an account of the assets an estimate is made of the value of the machinery and materials;[4] and in such estimate the company is treated as a going concern, whether it is solvent or insolvent.[5] An estimate is also made of the value of the ores broken, both underground and at the surface. But, apparently, no estimate is made of the value of the mine itself, or the unsevered minerals.[6] In taking an account of the liabilities, regard is had to the solvency or insolvency of the continuing members.[7] And the mere fact, that on previous occasions the purser of the mine in question may have allowed members to relinquish, without regard to the insolvency of continuing members owing arrears of calls, is not sufficient evidence of an agreement between the members that a relinquishment should always take place on that footing. For the course of practice followed by the officer of a company having numerous members is not so strong evidence of an agreement sanctioning that practice, as a course of practice in an ordinary partnership would be.[8] In taking an account of the liabilities, an estimate is also made of prospective costs and expenses up to the end of the then current month.[9] And in estimating the amount of a member's previous indebtedness (if any) to the company, regard is not exclusively had to calls actually and formally made, and remaining unpaid.[10]

Payment of balance.

If, upon the ultimate estimate, a debt is found due from the

[1] See n. [6] on preceding page, and authorities there cited.

[2] See Batten, 46.

[3] Frank Mills Co., 23 Ch. D. 52.

[4] Watson *v.* Spratley, 10 Exch. 226, 233.

[5] See Frank Mills Co., *u. s.*; where there was a valuation at breaking-up price.

[6] Batten, 46; Watson *v.* Spratley, *u. s.*

[7] Frank Mills Co., *u. s.*

[8] *Ib.*

[9] Batten, 46; Watson *v.* Spratley, *u. s.*

[10] Batten, 48, 49.

member to the company, it is, *primâ facie*, payable immediately. But, if a debt is found due from the company to the member; although it is due immediately; it is not payable, *primâ facie*, until the expiration of two years. And the continuing members are personally liable, *primâ facie*, to pay it at the end of the two years; and are so liable, although the assets of the company may be then exhausted.[1]

Action for account.

A member relinquishing his shares may also have an action to have his proportion of the assets ascertained and paid.[2]

Special contracts—waiver of account.

It is, of course, open to a member, upon relinquishing his shares, to agree with the continuing members, that no account shall be taken between them. Where such an agreement is made, the relinquishing member cannot subsequently claim his proportion of the assets. Nor, on the other hand, can he be subsequently rendered liable for calls; although made prior to the relinquishment.[3] The rules of a cost-book company provided, that a member might determine his liability upon giving notice in writing to the purser, and signing a relinquishment of all claims on the company in respect of the shares; and the prospectus contained statements to a similar effect. A member relinquished his shares in accordance with this provision; and the company was subsequently wound up. It was intimated, that the provision would not have applied, if the relinquishment had been fraudulent; and would probably not have applied, if the operations of the company had previously ceased, or if there had been a simultaneous relinquishment by all the members.[4] But, in the absence of these special circumstances, it was held, that the relinquishing member could not, as between himself and the other members, be made liable even for the debts existing at the time of the relinquishment.[5]

Waiver of payment.

Where the members of a cost-book company, some of whose shareholders were in arrear in respect of calls, agreed, that, if a member in arrear relinquished his shares, he might, within a limited time, redeem so many as, at the amount of former calls,

[1] Palmer's Case, 7 Ch. 286.
[2] Edwards' Case, 1 L. T. N. S. 399.
[3] *Ib.*
[4] See 4 De G. M. & G. 296, *per* Knight-Bruce, L.J.
[5] Fenn's Case, 4 De G. M. & G. 285. See also Mayhew's Case, 5 *ib.* 837; Bodmin United Mines, 23 Beav. 379, 380. 381.

would equal the amount paid by him; and no provision was made for payment of the calls then due; and certain members relinquished accordingly, and asserted their intention to redeem, but took no actual steps to redeem within the limited time; and the company was subsequently wound up; it was held, that the relinquishing members could not, the transaction having been *bonâ fide*, be put upon the list of contributories.[1] And where the purser of a company was authorized to conduct all correspondence; and a member desired to relinquish; and the purser wrote to him, stating the sum which he was to pay as his proportion of the liabilities; and he paid that sum, and then relinquished; it was held, that he became exempt from all liability as a member; although the rules of the company provided, that the affairs should be managed by a committee, and although the sum in question was less than the proper proportion.[2]

(γ) *Completion.*

A member who has relinquished his shares is entitled to have his name removed from the list of members.[3] Cost-book companies—removal of name.

A relinquishment does not affect the liability of the relinquishing member to the then existing creditors of the concern.[4] But, as in the case of transfer,[5] a member of a cost-book company gets rid of all liability in respect of future transactions, as soon as he has relinquished.[6] It has been said, that, where shares are relinquished, the company are under no obligation to save the relinquishing member harmless from contracts entered into while he was a member; except only in the way of contribution, as in the case of other partnerships.[7] But it is presumed, that the company would be free from such obligation only in case the relinquishing member had not, upon relinquish- End of liability.

[1] Bodmin United Mines, 23 Beav. 370, 381, *et seq.*

[2] Birch's Case, 28 L. J. Ch. 894. Cf. special contracts in the case of transfer. *ante*, p. 468.

[3] Birch's Case, 2 De G. & J. 10.

[4] See Bodmin United Mines, 23 Beav. 378.

[5] *Ante*, p. 467.

[6] Cox's Case, 4 De G. J. & S. 55 n. See Northey *v.* Johnson, 19 L. T. 204. As respects creditors, however, he must not continue to hold himself out as a member.

[7] Cox's Case, 4 De G. J. & S. 55 n.

ment, paid to the company the balance (if any) found due from him upon taking the usual accounts.[1]

Disposal of relinquished share in stannary company.

Where a share in an unregistered cost-book company, working "within and subject to the stannary jurisdiction,"[2] is relinquished, it must be carried to an account, called "The Account of Relinquished Shares;" and it is deemed to be the property of the company, and may be disposed of as the company think fit; and any member may purchase it, if sold.[3] A statutory declaration in writing by the purser or other agent of the company, that a share has been relinquished, is sufficient evidence of the facts therein stated as against all persons interested in the share. And that declaration, and the receipt of the purser for the price of the share, if sold, constitute a good title thereto. The purchaser must be entered in the cost-book as the holder of the share; and he is thereupon discharged as against the company from all unpaid calls, interest, and expenses, due to the company in respect thereof accrued before the purchase. And he is not bound to see to the application of the purchase-money; nor is his title affected by any irregularity in the proceedings in reference to the sale.[4]

c. Devolution.

(*a*) *Bankruptcy.*

Bankruptcy of member does not dissolve cost-book company.

On the same principle, that a voluntary transfer of a share in a cost-book company will not;[5] the bankruptcy of a member, and the vesting of his share in his trustee, will not; operate to dissolve the company.[6]

(*β*) *Death.*

Nor death.

For the same reason the death of a member of a cost-book company, and the devolution of his share, will not operate to

[1] See *ante*, p. 471. The registration of a cost-book company under a limited liability Act has no effect on the liability of a member, who has previously transferred or relinquished his shares: see *ante*, p. 448.

[2] See *ante*, p. 443.

[3] 32 & 33 Vict. c. 19, s. 21.

[4] S. 23. Cf. as to forfeited shares, *ante*, p. 454.

[5] See *ante*, p. 463.

[6] Tippet *v.* Johns, Tapping, 189.

dissolve the company.[1] In fact the doctrine of *delectus personæ* in no case applies to a cost-book company.

Interest in land treated as personalty.

If the interest of a member of a cost-book company includes an interest in the land itself, which seldom happens,[2] and against which there is a presumption,[3] the interest in the land itself will on his death be treated as personal estate.[4] In the great majority of cases shares in a cost-book company may be validly bequeathed to a charity; the interest of the owner of such shares seldom including an interest in the land itself.[5] It is otherwise in the rare instances, in which a lease of a cost-book mine is held in trust for the individual members in proportion to their shares,[6]

Mortmain Acts.

SECT. 5.—DISSOLUTION.

a. Sale.

Stannary company may sell its property.

Any unregistered company, working "within and subject to the stannary jurisdiction,"[7] may, by special resolution,[8] to which three-fourths in value of the members consent in writing or at a meeting, sell the machinery and materials, with or without the interest of the company in the leases or sett, as a going concern. But such sale must be by public auction; and due notice must be given by public advertisement in some local paper, and in some paper specially relating to mining companies, for two successive weeks before the sale; and no such power is allowed to prejudice the rights of lessors or creditors.[9] And any member, or any creditor in a creditor's suit, may, in a proper case, obtain an injunction to restrain the sale of machinery and other effects on a mine, or to restrain the sale of setts.[10] And if the company is a cost-book company, a creditor may, in addition, have an injunction to restrain the removal of the machinery and other effects, or to restrain the removal of the ores.[11]

[1] *Ib.*

[2] See *ante*, p. 464.

[3] See *ib.*

[4] See *ante*, p. 264.

[5] See Hayter *v.* Tucker, 4 K. & J. 243, 246, 251; referred to, *ante*, p. 264: see also *ante*, p. 464.

[6] See Hayter *v.* Tucker, *u. s.*

[7] See *ante*, p. 443.

[8] *Ante*, p. 449.

[9] 32 & 33 Vict. c. 19, s. 24. See Hayter *v.* Tucker, *u. s.*, 247.

[10] 32 & 33 Vict. c. 19, s. 36.

[11] Ord. March, 1876, tit. 'Purs. and

b. Winding-up.

Generally.

Stannary companies, whether registered or not, may be wound up in the Vice-Warden's Court, or in the Chancery Division of the High Court.[1] And, for the purpose of enabling a winding-up order to be made, an unregistered stannary cost-book company is deemed to be unable to pay its debts, if a decree or order absolute for the sale of its machinery, materials, and effects has been made in a creditor's suit in the Vice-Warden's Court.[2] Cost-book companies working in England (but not "within and subject to the stannary jurisdiction"[3]), or working in Wales, may, whether registered or not, be wound up in the Chancery Division of the High Court.[4] The Court may, at any time after the presentation of a petition to wind up a company, restrain further proceedings against it.[5]

Stannary companies—former member.

Where an unregistered stannary company is being wound up, a former member is not liable to contribute to the assets, if he has ceased to be a member for two years before the mine has ceased to be worked, or before the date of the winding-up order.[6] Accordingly a member of a cost-book mine in Cornwall, who had ceased to be a member more than two years before an order for winding up, was held not liable to be put on the list of contributories as a past member; although he had not so ceased for two years before the mine ceased to be worked.[7]

Wages of miners, &c.

Where a stannary company, whether registered or not, is being wound up, the amount (if any) due at the date of the winding-up order to miners, artisans, and labourers employed in or about the mine, in respect of wages or other earnings, not exceeding three months' wages or earnings, is payable in priority to all other debts.[8]

Disputed debts or claims.

If, in the course of proving the debts and claims of creditors in the Vice-Warden's Court, any debt or claim is disputed, or ap-

Cred. Suits,' O. 14. A list of injunctions is required to be exhibited at the Registrar's office for the inspection of all applicants: *ib.* See *ante*, p. 422.

[1] Comp. Act, 1862, ss. 79, 81, 199. See *ante*, pp. 422, 425.

[2] Comp. Act, 1862, s. 199.

[3] See *ante*, p. 443.

[4] Comp. Act, 1862, ss. 79, 81, 199. A company cannot, if unregistered, be wound up, unless it consists of more than seven members: s. 199.

[5] S. 85.

[6] 32 & 33 Vict. c. 19, s. 25.

[7] Chynoweth's Case, 15 Ch. D. 13.

[8] 32 & 33 Vict. c. 19, s. 26.

pears to be open to question, the Court may adjudicate upon it. The Court also has power, incidentally, to decide upon the validity and extent of any lien or charge claimed by any creditor on any property of the company in respect of such debt; and to make binding declarations of right. And for determining any question the Vice-Warden may direct and settle any action or issue. And the finding of the jury in such action or issue is conclusive of the facts found, unless the judge who tries it makes known to the Vice-Warden that he was not satisfied with the finding; or unless it appears to the Vice-Warden, that, in consequence of miscarriage, accident, or the subsequent discovery of fresh material evidence, such finding ought not to be conclusive.[1]

Interpleader.

And if, after an order for winding up in the Vice-Warden's Court, it appears that any person claims any property in, or any lien upon, any of the machinery, materials, ores, or effects on the mine, or on premises occupied by the company in connection with the mine, or to which the company was at the time of the order *primâ facie* entitled, the Vice-Warden or Registrar may adjudicate on such claim by interpleader.[2] And any action or issue directed upon such interpleader may be tried in the Vice-Warden's Court, or at the assizes or sittings in London or Middlesex before a judge of the High Court.[3]

Several Stannary companies.

Where several companies are in course of liquidation by the Stannaries Court, if a contributory of one of them is a creditor of another, the Vice-Warden may direct that the debt be attached, and payment suspended for a time certain, as a security for payment of the calls which may in the course of the liquidation become due from him to the company of which he is a contributory; and the amount may be made applicable and applied to such payment in due course. But no order of attachment is allowed to prejudice any claim which the indebted company may have by way of set-off or otherwise; or any claim of lien or specific charge on the debt in favour of any third person.[4]

[1] Comp. Act, 1862, s. 108.

[2] S. 116.

[3] *Ib.*

[4] 32 & 33 Vict. c. 19, s. 34. As to affidavits in winding-up matters, see Ord. March, 1876, tit. Wind-up Comp. O. 15. The previous state of the law as to the winding up of Cost-book and Stannary companies was in many respects anomalous, and deserves mention. The Act 11 & 12 Vict. c. 45. s. 2, provided that the winding-up jurisdiction of the Court of Chancery should extend to companies formed for the

Sect. 6.—RECOGNITION OF COST-BOOK CUSTOM.

Cost-book custom must be proved in ordinary courts.

Of the various peculiarities of a cost-book company, those, which have not had their origin in statute, constitute the cost-book custom. The existence and the nature of the custom in the case of companies in Cornwall and Devonshire have always been recognised by the Stannaries Court;[1] and the existence of the custom has frequently received recognition from the legislature.[2] The ordinary courts of the realm do not, however, take judicial cognizance of the custom; and its nature and application in any particular case must be there proved by the party alleging them.[3]

purpose of working mines or minerals. Companies formed before the passing of this Act, not being within its provisions (Wyld's Case, 1 Mac. & G. 1; 1 H. & T. 125), were brought within them by 12 & 13 Vict. c. 108, s. 1. S. 1 of the latter Act also provided that the Chancery jurisdiction should not affect the Stannary jurisdiction in Cornwall; or extend to cost-book mines within the latter jurisdiction, unless on the petition (for instances of which see Bosworthon Co., 26 L. J. Ch. 612; Wheal Anne Co., 10 W. R. 330; s. c. 30 Beav. 601) of the owners of at least one-tenth of the shares. This proviso was not apparently repealed by 20 & 21 Vict. c. 78, s. 12; which required the leave of the Court of Chancery or the certificate of the Vice-Warden as a condition to the presentation of a petition (South Lady Bertha Co., 2 J. & H. 376). But it was not extended to mines in Devon by 18 & 19 Vict. c. 32, which brought that county within the Stannary jurisdiction (*Ib.*). The Stannaries Court had no jurisdiction to stay proceedings by creditors against individual shareholders; and on that very ground the leave required by 20 & 21 Vict. c. 78, s. 12, was frequently granted (Tretoil, &c., Co., 2 J. & H. 421; South Lady Bertha Co., *u. s.*; Wheal Anne Co., *u. s.*). The presentation of a petition to the Court of Chancery under the former Acts to wind up a company within the Stannaries operated as an injunction against creditors (North Tamar Mine, referred to in 2 J. & H. 422). But they were not entitled to appear and oppose (Tretoil, &c., Co., *u. s.*)

[1] See Cox's Case, 4 De G. J. & S. 55 n.; Gaved *v.* Martyn, 19 C. B. N. S. 732, 757.

[2] See 7 & 8 Vict. c. 110, s. 63; 12 & 13 Vict. c. 108, s. 1 (repealed by Comp. Act, 1862): see also 6 & 7 Will. 4. c. 106, s. 43; 18 & 19 Vict. c. 32, ss. 17, 22; 32 & 33 Vict. c. 19, s. 2. See also Fenn's Case, 4 De G. M. & G. 293, *per* Lord Cranworth.

[3] Fenn's Case, *u. s.*, 293, 295; Hawkins' Case, 2 K. & J. 253, 263; Richardson's Case, 4 W. R. 670; Bodmin United Mines, 23 Beav. 370, 378, 379; Johnson *v.* Goslett, 3 C. B. N. S. 591, 592; Frank Mills Co., 23 Ch. D. 55, 58. Cost-book companies are, in all other respects than those stated in this chapter, governed by the same equitable principles as those which apply to ordinary mining partnerships (as to which, see *ante*, pp. 115, *et seq.*; 139, *et seq.*): see Proc. in Stan. (1856) Int. Not. 27.

CHAPTER XX.

GLOUCESTERSHIRE RIGHTS AND CUSTOMS.

a. Generally.

Generally—rights of property.

THE Hundred of St. Briavels, in the County of Gloucester, includes within its ambit the whole of the Forest of Dean and several of the surrounding parishes.[1] The greater portion of the surface of the Forest belongs to the Crown.[2] The smaller portion is in private hands.[3] The surface of the Hundred, not within the Forest, belongs partly to the Crown; and is partly in private hands.[4] That portion of the surface of the Hundred, which belongs to the Crown, is partly inclosed and partly uninclosed. And in like manner that portion of the surface of the Hundred, which is in private hands, is partly inclosed and partly uninclosed.[5] With certain few exceptions,[6] all the mines and quarries of every description throughout the Hundred belong to the Crown.[7] The interests of the Crown are represented by the First Commissioner of Woods, Forests, and Land Revenues, as 'Gaveller' of the Forest; or by his Deputy.[8]

[1] See Allaway *v.* Wagstaff, 4 H. & N. 683. As to the extent of the Hundred and Forest, see Wood, Laws of the Dean Forest, 4, 5, 12.

[2] Wood, 5, 6.

[3] *Ib.*; 1 & 2 Vict. c. 43, s. 68.

[4] Wood, 7; 1 & 2 Vict. c. 43, s. 68.

[5] See 1 & 2 Vict. c. 43, ss. 67, 68; Allaway *v.* Wagstaff, *u. s.*; Wood, 170, 171. The wood known as the "Abbot's Wood," which formerly formed part of the Forest (see 33 Vict. c. viii.), continues uninclosed land within the Forest for the purposes of 1 & 2 Vict. c. 43, and 24 & 25 Vict. c. 40: see 33 Vict. c. viii., s. 9.

[6] Wood, 7.

[7] See the preamble of 1 & 2 Vict. c. 43; Wood, 6, 7. Prior to the Act a Mr. William Ambrose claimed the right, as Lord of the Manor of Blakeney, to grant gales for quarries, and exact gale fees and rents, within the bailiwick of Blakeney in the Forest. This claim was expressly saved by the Act (s. 85); but its invalidity was subsequently established: see A.-G. *v.* Mathias, 4 K. & J. 579.

[8] 1 & 2 Vict. c. 43, s. 13. The Deputy must be a person skilled in mining: *ib.* As to his salary, see s. 88.

Customs.

The mines of coal and iron and the quarries of stone[1] throughout the Hundred, so far as they belong to the Crown,[2] are subject to the rights of the 'free miners' to have 'gales' and leases thereof granted to them. But such rights are only exerciseable under certain conditions for the benefit of the Crown; and, in case the minerals in question are under inclosed land (whether belonging to the Crown or to a private person), under certain other conditions for the benefit of the owner of such inclosed land. The free miners have also certain rights as between themselves. The rights of the free miners are ancient rights, which had their origin in custom; and which existed more or less imperfectly from the time of the Romans.[3] But the rights, and the conditions upon which they are exerciseable, are now almost[4] wholly regulated by statute.[5]

[1] The Crown mines, other than those of coal and iron, and the Crown quarries, other than those of stone, are not subject to the rights of the free miners; but are subject to the general law affecting mines and quarries in Crown lands: see Wood, 48. 369. See, as to the general law, *ante*, pp. 145, 173. 174.

[2] See Wood, 7.

[3] See James *v.* The Queen, 5 Ch. D. 158, *per* James, L.J.

[4] S. 68 of 1 & 2 Vict. c. 43 provided that, if the owner of any inclosed land within the Hundred gave notice within six months to the Commissioners appointed thereunder of his desire that the provisions of the Act should not extend to such land, the Act should be thereupon taken not to extend thereto; but that all customs and privileges in force at the passing of the Act, so far as respected such land, should continue in force. Various owners of inclosed land of the Hundred outside the Forest (including the Commissioners of Woods on behalf of the Crown) gave notice under this provision (see 34 & 35 Vict. c. 85. s. 3; Wood, 171); and the rights of free miners in respect of the land affected by such notice are not, accordingly, regulated by Statute. Whether free miners have any rights, irrespectively of Statute, is not certain. That they have not was laid down broadly in A.-G. *v.* Mathias (4 K. & J. 579); on the ground, that the custom, under which they claimed the right to work, could not have had a legal origin (see, as to the requisites of a custom, *ante*, p. 90, n. [2]). But the correctness of this assertion has been doubted (see Wood, 171); and it is submitted, that the doubt is well founded: see the observations as to the validity of the custom of tin-bounding in Cornwall, to which a greater number of objections might be urged, *ante*, pp. 435, 436, 437. At all events, the land affected by the notice is so small in extent (see Wood, 459, 460), that the validity of the rights in respect of it can hardly be of much practical consequence. The custom, irrespectively of Statute (as to which, see Doe *v.* Pearce, 2 Peake's N. P. Cas. 242; A.-G. *v.* Jackson, 5 Ha. 355; Brain *v.* Harris, 10 Exch. 908), is the same in its general features as that prescribed by Statute; and will not be further referred to.

[5] 1 & 2 Vict. c. 43, s. 31. See 59 Geo. 3, c. 86; 1 & 2 Vict. c. 43; 24 & 25 Vict. c. 40; 33 Vict. c. viii. (local as to Abbot's Wood); 34 & 35 Vict. c. 85. The Act 1 & 2 Vict. c. 43 appointed

By 'free miners' is meant all male persons born or to be born, and abiding, within the Hundred, of the age of twenty-one years and upwards, who shall have worked a year and a day in a coal or iron mine within the Hundred.[1] Male persons born or to be born, and abiding, within the Hundred, of the age of twenty-one years and upwards, who shall have worked a year and a day in a stone quarry within the Forest, are also free miners so far as relates to gales and leases of stone quarries within the open lands of the Forest.[2]

Meaning of "free miners."

All persons claiming to be free miners are required to send their names and places of residence to the Gaveller or Deputy for registration. And a list of the names and places of residence of the free miners (distinguishing such as have worked in mines,

Registration of free miners.

Commissioners to ascertain the metes and bounds of gales existing at the passing of the Act; and the mode and extent in and to which they might be continued and worked; and the persons entitled to work them, and to the benefit of incidental privileges (see ss. 1 to 6, and 8 to 12, inclusive, 86, 87); and it contained elaborate provisions for the execution of their duties (see ss. 7, 24, 26, 27, 28, 32 to 40, inclusive, 56). Those provisions resulted in the issue in 1841 of three several awards by the Commissioners; the 'Coal' award, the 'Iron' award, and the 'Quarry' award. See Wood, 199, *et seq.*; 272, *et seq.*; and 291, *et seq.*; where the awards and the schedules thereto are set out. The awards specified the persons actually in possession of gales at the passing of the Act, and the gales then being worked by them; and confirmed their titles to work. The first schedule to each award dealt with metes and bounds; and presumably (see Thomas *v.* Atherton, 10 Ch. D. 201, 202), terminated equitable or supposed equitable titles of earlier creation and inconsistent therewith. The plans and schedules are said to be inaccurate: see Matthews *v.* Harris, 14 L. T. 307; Brain *v.* Harris, 10 Exch. 914; Thomas *v.* Atherton, 10 Ch. D. 187, 200, 201. The second schedule to each award laid down the rules, according to which the confirmed gales, and all subsequent gales, were to be worked. Certain of the rules in the second schedules to the C. and I. awards requiring modification, and, in some respects, explanation, the Act 34 & 35 Vict. c. 85 appointed Commissioners for those purposes. And those Commissioners shortly afterwards issued their award, making the necessary modification and explanation: see Wood, 365 *et seq.*, where the award is set out. Whether the Commissioners appointed under 1 & 2 Vict. c. 43 had any authority thereunder to impose on gales any rules or conditions, which would derogate from the interest possessed by them at the time of the passing of the Act, is doubtful: see Goold *v.* Gt. West. Deep Coal Co., 2 De G. J. & S. 600, *per* Lord Westbury. A copy of the rules is required to be hung up in the Speech House in the Forest: 1 & 2 Vict. c. 43 s. 54; 34 & 35 Vict. c. 85, s. 31. The third schedules to the C. and I. awards of 1841 specified the persons, who were in possession of licences in respect of the soil of the Forest for facilitating their workings; and the particulars of the licences.

[1] 1 & 2 Vict. c. 43, s. 14.

[2] S. 15; see s. 83.

and such as have worked in quarries), under the hand of the Gaveller or Deputy, is required to be transmitted once at least in every year to the Commissioners of Woods for enrolment in the office of Land Revenue Records and Enrolments.[1] The Gaveller or Deputy may refuse to register, unless the claimant proves that he is a free miner.[2] But the refusal may be the subject of appeal to the Sessions, or to the Court of Verderers for the Forest.[3] And the Gaveller or Deputy is required to register persons declared to be free miners pursuant to any order of Sessions or of the Court of Verderers.[4] No person can be deemed a free miner who is not registered.[5] Extracts from the register are admissible in evidence.[6]

Meaning of "gales."

By 'gales' is meant the holdings of mines of coal and iron within the Hundred, and quarries of stone within the Forest, the titles to which were confirmed by the awards of 1841;[7] and the grants of mines of coal and iron within the Hundred, which have since been made.[8]

b. Mutual Rights of the Crown and Free Miners.

(*a*) *Gales.*

Nature of gales and persons entitled thereto.

Gales, the titles to whose holdings of mines of coal and iron, and quarries of stone, were confirmed by the awards of 1841,[9] consisted exclusively of free miners.[10] And free miners, registered as such by having worked a year and a day in a mine of coal or iron,[11] have been, and are, exclusively entitled to coal and iron gales of later creation.[12] However, no coal or

[1] S. 16. All Acts authorised to be done by the Commissioners may be done by one of them: 24 & 25 Vict. c. 40, s. 27.

[2] 1 & 2 Vict. c. 43, s. 17.

[3] S. 19. The appeal must be brought within four calendar months, and notice of it must be given to the Deputy fourteen days before the hearing: *ib.* As to the Court of Verderers, see Wood, 4. As to the ancient 'Mine Law Courts,' see Wood: see also Morse *v.* James, Willes, 122; Doe *v.* Pearce, 2 Peake, N. P. 243.

[4] 1 & 2 Vict. c. 43, s. 20.

[5] S. 21.

[6] S. 22.

[7] See *ante*, p. 480, n. [5].

[8] See, as to these grants, Wood, App. A., pp. 371, *et seq.*; App. B., pp. 453, *et seq.* 'Gale,' though now frequently used as a mere synonym for rent, had originally the meaning of tribute or service: see Morgan *v.* Crawshay, L. R. 5 H. L. 304, n.

[9] See *ante*, p. 480, n. [5].

[10] See 1 & 2 Vict. c. 43, ss. 24 *et seq.*; and see the three awards of 1841.

[11] See *ante*, p. 481.

[12] 1 & 2 Vict. c. 43, s. 23. Proceed-

iron gales of later creation can be granted in inclosed lands of the Crown, so long as they continue inclosed; although such gales as are already in such lands, and were confirmed by the awards of 1841, may be worked by the galees, on condition of doing no damage thereto.[1] All existing gales of quarries were comprised in the Quarry award of 1841.[2] And no quarry gales have been, or can be, of later creation than the passing of the Act 1 & 2 Vict. c. 43; that Act having prohibited the subsequent opening of quarries, except by virtue of then existing quarry gales, or of subsequent quarry leases.[3]

Applications and grants.

An applicant for a subsequent coal or iron gale is required to describe in writing the situation of the proposed gale, and the name of the vein proposed to be worked. And the Gaveller, in setting out the metes and bounds thereof, is required to obtain the previous approval in writing of the Commissioners of Woods; and to have regard to the probable cost of the winning, and the estimated quantity of the minerals.[4] An applicant for a gale is not bound, until a gale is actually granted to him. At any time previously he may withdraw his application, and the Crown cannot compel him to accept the grant.[5] In order that a grant of a gale may be effectual, the grant, and all the terms and conditions thereof, and the payments to be made in respect thereof, must be entered in the Gaveller's books; and subsequently enrolled in the Office of Land Revenue.[6] A gale may be had to two or more persons jointly.[7]

Estate of galee.

Every galee, whether of a mine of coal or iron or of a quarry of stone, possesses an interest in the nature of an estate in fee simple.[8] And such interest probably makes him, if he be in actual possession, an occupier for rating purposes.[9] As soon,

ings in *Quo Warranto* are maintainable against a person who improperly claims to exercise the rights of a free miner: R. *v.* Harris, 11 A. & E. 518.

[1] 1 & 2 Vict. c. 43, s. 64.

[2] S. 83.

[3] *Ib.* As to leases, see *infra*, (β).

[4] 1 & 2 Vict. c. 43, s. 56; C. award. sch. 2, r. 11; I. award, sch. 2, r. 11.

[5] James *v.* The Queen, 5 Ch. D. 160, 161, *per* Mellish, L.J.

[6] 1 & 2 Vict. c. 43, s. 57.

[7] See Wood, 165: see Doe *v.* Pearce, 2 Peake's N. P. 242.

[8] 24 & 25 Vict. c. 40, s. 1. It was the same before the Act: see Doe *v.* Pearce, 2 Peake's N. P. 242.

[9] See Morgan *v.* Crawshay, L. R. 5 H. L. 304.

however, as the mineral is gotten, his interest ceases; and the space occupied by the mineral becomes vested in the Crown.[1]

Metes and bounds of gales—Brain *v.* Harris.

The metes and bounds of gales, confirmed by the awards of 1841, are ascertained;[2] although not, it is said, with complete accuracy.[3] The metes and bounds of subsequent gales are required to be precisely specified in the instruments of grant.[4] When new works are opened, a memorandum of the situation and extent of the ground to be occupied by each pit or level mound is required to be entered in the 'Surface Boundary Book,' and to be marked on the copy of engraved plans; both of which are kept at the Gaveller's office.[5] In *Brain* v. *Harris*,[6] the southern boundaries of a colliery were defined by the Coal Award of 1841 as follows:—"Commencing at the point where the said level struck the coal, and extending in an eastern direction as deep as the said level will drain." It was, before the award, the custom, on obtaining a gale, to drive an adit from the surface into the coal in a horizontal direction, but at such an inclination upwards as to allow water to flow along it from the mine to the surface. And every miner, who had driven such an adit, was entitled to all the coal, which could be drained by an adit continued from the point, where the adit so made from the surface first struck the coal. There was, at the date of the award, an existing level driven from the surface upwards and eastwards into the coal from the point, where the adit first struck it. It was contended, that the boundary which was meant was an imaginary mathematical line drawn horizontally eastward from the point, where the level struck the coal. It was, however, held, that the existing level was the boundary.[7]

[1] Goold *v.* G. W. Deep Coal Co., 2 De G. J. & S. 607, *per* Lord Westbury.

[2] See the first schedules to the awards of 1841.

[3] See *ante*, p. 480, n. [5].

[4] See 1 & 2 Vict. c. 43. s. 56. For descriptions of the gales of coal and iron granted subsequently to the C. and I. awards of 1841, see Wood, App. A., pp. 371 *et seq.*; App. B., pp. 453 *et seq.* The boundaries of gales of coal are sometimes defined by levels driven from the bottoms of pits; and the boundaries of gales of coal or iron are sometimes defined by workings of other tracts. Rr. 20, 21, of C. award, and r. 19 of I. award, provide for questions arising upon these points.

[5] C. award, sch. 2, r. 10; I. award, sch. 2, r. 10. See 34 & 35 Vict. c. 85, s. 38.

[6] 10 Exch. 908.

[7] Mr. Wood doubts the authority of this case: see Wood, 452, 453.

'Galeage,' or dead rents, and also royalties, are commonly payable to the Crown in respect of the gales confirmed by the awards of 1841.[1] Dead rents and royalties may also be made payable in respect of, and are required to be specified in the instruments of grant of, subsequent gales.[2] And if, upon the grant of a subsequent gale, the Gaveller or Deputy cannot agree with the miner as to the amount of rent or royalty, the amount is determinable by arbitration.[3] Indeed, a subsequent gale is only grantable on condition, that the galee either works and gets a sufficient quantity of mineral to pay the amount of dead rent, which the Gaveller or the arbitrator determines; or pays the deficiency.[4] However, so long as a subsequent galee continues in occupation of his gale, paying his rent and royalties, and observing the conditions under which he holds, he is allowed to make up the short working of any year of his holding in any succeeding year.[5] And a subsequent galee is under no liability to pay rent or royalty for works opened by him during the first two years, in the case of a galee of coal, or during the first four years, in the case of a galee of iron; unless in the meantime he has worked by means thereof.[6] And, with respect both to the confirmed gales, and to subsequent gales, of coal, no tonnage rent is payable on coals consumed by engines used for colliery purposes.[7] The galeage rent is payable on the 31st of December in every year, and the royalties on the 30th of June and 31st of December.[8] The rents and royalties payable in

'Galeage' rent—royalty.

[1] 1 & 2 Vict. c. 43, ss. 27, 41, 42, 43, 46, 51, 52, 56. These payments are in lieu of the ancient right of the Crown to put in a fifth man to work gales and share the profits: see s. 44: see also Doe *v.* Pearce, 2 Peake's N. P. 242; A.-G. *v.* Jackson, 5 Ha. 362, 363. The commissioners were not by the Act obliged to reserve a rent in respect merely of minerals actually got: they were empowered to reserve a dead rent as well as a royalty: see Seymour *v.* Morrell, 17 L. T. 139. And in making their awards they were empowered to take into consideration the fact that no previous rent had been paid: see A.-G. *v.* Jackson, 5 Ha. 364, 366. But they were not empowered to compel miners to pay, in ready money, for by-gone workings; or to exclude them from the award, if they refused to pay: see *ib.* 355.

[2] 1 & 2 Vict. c. 43, s. 56.

[3] *Ib.* Sec. generally, as to arbitration proceedings, ss. 47. *et seq.*

[4] C. award, sch. 2, r. 13; I. award, sch. 2, r. 13.

[5] C. award, sch. 2, r. 14; I. award, sch. 2, r. 14; award of 1871. Cf. the average clause in leases, *ante*, p. 217.

[6] C. award, sch. 2, r. 5; I. award, sch. 2, r. 5.

[7] C. award, sch. 2, r. 16.

[8] 34 & 35 Vict. c. 85, s. 35: see Wood, 157, 158.

respect both of the confirmed gales, and of subsequent gales, are liable to revision every twenty-one years;[1] and, if an agreement cannot be come to as to the amount of the substituted rent or royalty, it is determinable by arbitration.[2] Every agreement or award as to the amount of the substituted rent or royalty is required to be enrolled in the Office of Land Revenue.[3]

Collateral agreement to pay larger rent.

The Crown cannot enforce a parol agreement to pay a larger rent than that specified in a grant.[4] And, unless the other party can be restored to his previous position, it cannot have the grant set aside, merely because its officers by a mistake thought that the agreement was enforceable.[5] But it may of course have the grant set aside on the ground of fraud.[6] And it may, it seems, successfully resist proceedings by the other party to enforce the grant, if he refuses to pay the larger rent.[7]

Accounts—plans—inspection.

Every galee is obliged to keep accounts of the produce of his workings; and to make plans of his workings, when required by the Gaveller.[8] And the Gaveller or Deputy, or the Commissioners of Woods, are entitled to enter all works, and inspect the plans; and also to inspect the workings, and make plans thereof.[9]

Remedies for non-payment of rent or royalty.

The obligation to pay the rents or royalties in respect of gales is a personal obligation on the person for the time being in actual possession or receipt of the proceeds of the gale; whether as owner, lessee, underlessee, or otherwise.[10] The rents or royalties are recoverable either by distress;[11] or by an action in the nature of an action of covenant;[12] or by an action for an account.[13] And, if the amount does not exceed £50, the action may be brought in the County Court.[14] The Gaveller, as representing the Commissioners of Woods, is the proper

[1] 1 & 2 Vict. c. 43. ss. 27, 46; 24 & 25 Vict. c. 40, s. 7.

[2] 1 & 2 Vict. c. 43, ss. 27, 47, 48; 24 & 25 Vict. c. 40. s. 8; 34 & 35 Vict. c. 85. s. 37.

[3] 1 & 2 Vict. c. 43, s. 50.

[4] A.-G. *v.* Jackson, 5 Ha. 355.

[5] *Ib.*: see pp. 366 *et seq.*

[6] *Ib.* p. 366.

[7] *Ib.* p. 365.

[8] 1 & 2 Vict. c. 43, s. 45.

[9] S. 53; C. award, sch. 2, rr. 16, 17; I. award, sch. 2, rr. 16, 17; Q. award, sch. 2, r. 6.

[10] 24 & 25 Vict. c. 40, s. 4.

[11] 59 Geo. 3, c. 86, s. 7; 1 & 2 Vict. c. 43, s. 52; 24 & 25 Vict. c. 40, s. 4; 34 & 35 Vict. c. 85. s. 36.

[12] 59 Geo. 3, c. 86, s. 8; 1 & 2 Vict. c. 43, s. 52; 24 & 25 Vict. c. 40, s. 4; 34 & 35 Vict. c. 85, s. 36.

[13] See A.-G. *v.* Jackson, 5 Ha. 355, 368.

[14] 24 & 25 Vict. c. 40, s. 5.

person to sue.[1] The Crown may also proceed by information.[2]

(β) *Leases.*

Leases of quarries.

The Commissioners of Woods are empowered to grant leases to free miners of any quarries in the Forest for twenty-one years; subject to such rent and conditions as they think proper.[3]

Other leases.

They may also grant leases to free miners[4] for twenty-one years of the right to get clay or sand from the open or waste lands of the Forest.[5] And they may grant to the person or persons entitled to any pit, level, quarry, or work, leases for twenty-one years of the right to get clay or sand therein. But the last-mentioned leases; and the right to work the pit, level, quarry, or work in question; must always be vested in the same person or persons.[6] They may also grant leases for twenty-one years of any part of the open or waste land of the Forest for the purpose of erecting kilns or other works for the manufacture and burning of the clay into bricks or tiles.[7] All the leases so authorised must be made subject to such rents and conditions as the Commissioners think fit. But the rents must be reserved to the Crown free of all taxes and assessments; and the leases must contain conditions of re-entry on non-payment of the rent or non-observance of the conditions; and they must be enrolled in the Office of Land Revenues, and entered in the office of the Commissioners of Woods.[8] The Commissioners may also grant leases to free miners, whether of mines or quarries, for thirty-one years, of any part (not exceeding six acres for a coal or iron mine, and one acre and a half for a quarry), of the uninclosed waste land of the Forest, for any purposes connected with the convenient working of any mine or quarry. And every such lease may contain an agreement for the renewal thereof. Every such lease must be enrolled.[9] And, if granted in connexion with a

[1] Seymour *v.* Morrell, 17 L. T. 139; 24 & 25 Vict. c. 40, s. 5.

[2] 59 Geo. 3. c. 86, s. 10. Non-payment also entails the liability to forfeiture: see *infra* (ζ).

[3] 1 & 2 Vict. c. 43, s. 83; 24 & 25 Vict. c. 40, s. 2.

[4] Or to any other person or persons: see 1 & 2 Vict. c. 43, s. 84.

[5] S. 84; 24 & 25 Vict. c. 40, s. 2.

[6] 24 & 25 Vict. c. 40, s. 17.

[7] *Ib.*

[8] 1 & 2 Vict. c. 43, s. 84.

[9] S. 25; 24 & 25 Vict. c. 40, s. 6.

coal or iron gale, a memorandum of the grant must be entered in the 'Surface Boundary Book,' and marked on the copy of engraved plans, kept at the Gaveller's office.[1]

Recovery of rent or royalty.

The amount of any rent or royalty payable under any lease, not exceeding £50, may be recovered in the County Court.[2]

(γ) *Liberties and Licenses.*

Not subject to rents, &c.

Every coal or iron galee may make and use all necessary levels, drifts, drains, 'cuts-out,'[3] water-courses, pits, shafts, and pit-heaps; and use such heap room, as may be sufficient for the purposes of his workings.[4] But before any new works can be opened, the situation and extent of the ground to be occupied by each pit or level mound must be determined by the Gaveller or Deputy.[5] Every quarry galee or lessee may, in like manner, make and use all necessary roads, drains, and spoil banks.[6] Upon obtaining the previous sanction in writing of the Commissioners of Woods, a coal or iron galee, or a quarry galee or lessee, may make and use all such railroads and other roads as the Gaveller or Deputy may deem requisite for his workings.[7] And, upon obtaining the like sanction, a coal or iron galee may erect any steam or fire-engine within any inclosure, or within sixty yards from the fence of any inclosure.[8] However, the erection of steam-engines or dwelling-houses in inclosed land is unlawful without the previous consent in writing of the owner.[9] And where a coal or iron gale, pit, or level, is opened within inclosed land, no building can be erected or work made, except such as the Gaveller may consider absolutely necessary; and in the manner least injurious to the inclosed land.[10]

Subject to rents, &c.

The Commissioners of Woods are empowered, upon such rents,

[1] C. award, sch. 2, r. 10; I. award, sch. 2, r. 10.

[2] 24 & 25 Vict. c. 40, s. 5.

[3] As to the inclination of 'cuts-out,' see C. award, sch. 2, r. 22; I. award, sch. 2, r. 20.

[4] C. award, sch. 2, r. 1; I. award, sch. 2, r. 1.

[5] C. award, sch. 2, r. 10; I. award, sch. 2, r. 10.

[6] Q. award, sch. 2, r. 1.

[7] C. award, sch. 2, r. 3; I. award, sch. 2, r. 3; Q. award, sch. 2, r. 2.

[8] C. award, sch. 2, r. 7; I. award, sch. 2, r. 7.

[9] 1 & 2 Vict. c. 43, s. 69.

[10] C. award, sch. 2, r. 23; I. award, sch. 2, r. 21. As to liberties incident to the coal and iron gales confirmed by the awards of 1841, see C. award, sch. 3; I. award, sch. 3.

conditions, and regulations as they think fit, to grant licenses to sink, open, work, and use pits, shafts, or levels; and to make roads; and to use rights of way, water, air, outstroke,[1] instroke,[2] or other easements for working and disposing of the produce of any gale or quarry; in or under any of the waste or inclosed lands of the Crown in the Forest; or under any mine or quarry comprised in any existing gale or lease. But the licensee must do as little damage as may be. And he must compensate all persons who may be injured. And, on ceasing to use or require the easement in question, he must restore the land to its former condition, unless required by the Gaveller or Deputy to leave it in its then present condition. Every such license is required to be entered in the books of the Gaveller or Deputy; and to be enrolled.[3] The amount of any rent or royalty payable under any license, not exceeding £50, may be recovered in the County Court.[4]

(δ) *Rules as to Working.*

Workings.

Every galee of an unopened coal or iron gale is obliged to *bonâ fide* commence opening the same within five years from the date of his grant. But this time may, in the case of an unavoidable or unforeseen mining accident or impediment occurring, or in the case of any other reasonable cause of delay being proved to the satisfaction of the Gaveller, be extended. Disputes as to whether there has been a *bonâ fide* opening, or as to an extension of time, are determinable by arbitration.[5] Every coal or iron galee, and every quarry galee or lessee, is obliged to work in a fair, orderly, and workmanlike manner; and according to the best and most improved system for the time being; and not to desist from working for five years at any one time after the vein in question has been gained.[6] A quarry galee or lessee must not overrun or commit any waste or spoil of stone; and he must not interrupt or interfere with any public footpath, or any road not properly belonging to his

[1] See *ante*, p. 238.
[2] See *ante*, p. 231.
[3] 1 & 2 Vict. c. 43, s. 65; 24 & 25 Vict. c. 40, s. 15.
[4] 24 & 25 Vict. c. 40, s. 5.
[5] Award of 1871.
[6] C. award, sch. 2, r. 9; I. award, sch. 2, r. 9; Q. award, sch. 2, r. 5.

quarry.[1] Nor must he, in working near the boundary of any inclosure, carry forward his workings, so as to injure the inclosure, or the wall or other fence or boundary thereof; without the consent in writing of the Commissioners of Woods. And he must leave so much space on the outside of any such inclosure, as may be necessary for the protection of the boundaries, and for the continuance of any adjoining carriage or bridle road or footpath.[2] Every galee of a coal gale created subsequently to the awards of 1841 is obliged to leave barriers of coal in each vein, of such width and in such situations, as the Gaveller or Deputy may from time to time direct.[3]

Discontinuance of workings.

In the event of any coal or iron gale, which is drained by a steam-engine, or other machinery, and which lies above any other gale also worked by a steam-engine, being worked out or abandoned before the lower gale, the holder of the upper gale is obliged to leave at the office of the Gaveller three months' previous notice in writing of his intention to discontinue the working of the engine.[4] And every galee of a coal or iron gale created subsequently to the awards of 1841 is obliged, on abandoning or disusing a level pit or other work opened by him, to remove all unnecessary buildings and works, and to smooth the surface of the ground; and to set up upon or about any such abandoned or disused work such walls and fences or other protection, as the Gaveller or Deputy may deem necessary for the safety of cattle. And, upon refusing or neglecting to do these acts within three months after notice, they may be done at his expense.[5] And the Gaveller or Deputy, or the Verderers, have a general authority to order the removal of buildings and works, which are no longer necessary for the working of mines or quarries. But the owner of such buildings or works is entitled to the materials.[6]

Special rules.

The working of gales created subsequently to the awards of 1841 may also be made subject to such further special rules, as the Gaveller or Deputy may, with the approval in writing of the Commissioners of Woods, in each case think necessary.[7]

[1] Q. award, sch. 2, r. 5.
[2] R. 8.
[3] C. award, sch. 2, r. 18.
[4] R. 8; I. award, sch. 2, r. 8.
[5] C. award, sch. 2, r. 12; I. award sch. 2, r. 12.
[6] 1 & 2 Vict. c. 43, s. 83.
[7] S. 56.

The obligation to observe the rules, subject to which a gale is held, is a personal obligation on the person for the time being in actual possession, or receipt of the proceeds of the gale; whether as owner, lessee, under-lessee, or otherwise.[1] Compliance with the rules may be enforced by an action in the nature of an action of covenant;[2] or by an injunction in the Queen's Bench Division;[3] at the suit of the Crown.[4] Remedies for non-compliance.

(ε) *Transfer and Devolution.*

Galees may sell, assign, transfer and dispose of their gales, either by deed or will, to each other, or to any other person or persons; and lessees of quarries have similar rights.[5] Delay is fatal to the right of enforcing a contract to sell or purchase a gale.[6] Transfers of gales, or of leases of quarries, *inter vivos*, are required to be entered within three months in the books of the Gaveller or Deputy;[7] and unregistered transfers are void.[8] The Gaveller or Deputy may refuse to register the transfer of a gale or lease until the rent or royalty payable in respect thereof has been paid.[9] And, where a transfer or devolution has already taken place otherwise than by deed requiring registration, as by will or descent, he may refuse to register the subsequent transfer, unless the deed effecting it contains a recital of the circumstances under which the unregistered transfer or devolution took place.[10] Persons proposing to purchase may ascertain, whether payments are in arrear, upon applying to the Gaveller or Deputy.[11] Generally.

The Commissioners of Woods may, at such rent and on such terms as may be agreed on, grant renewals of leases of quarries, for terms not exceeding twenty-one years, to the assignees of Renewals of quarry leases.

[1] 24 & 25 Vict. c. 40, s. 4.

[2] *Ib.*

[3] 1 & 2 Vict. c. 43, s. 29. See Ross *v.* Rugge-Price, 1 Ex. D. 269; Brain *v.* Thomas, 50 L. J. Q. B. 662.

[4] Forfeiture may also ensue on non-compliance: see *infra* (ζ).

[5] 1 & 2 Vict. c. 43, s. 23.

[6] Alloway *v.* Braine, 26 Beav. 575. See *ante*, pp. 194, 195.

[7] 1 & 2 Vict. c. 43, s. 58. For the form of the minute to be brought for registration, see sched. to 24 & 25 Vict. c. 40: see also ss. 10, 12, 13, of that Act.

[8] 24 & 25 Vict. c. 40, s. 14. The Commissioners of Woods may, however, authorize *nunc pro tunc* entries: 1 & 2 Vict. c. 43, s. 59.

[9] 24 & 25 Vict. c. 40, s. 9.

[10] S. 11.

[11] S. 9.

free miners; although such assignees be not themselves free miners.[1]

(ζ) *Forfeiture and Surrender.*

Forfeiture.

Non-payment of the rents or royalties in respect of gales entails the liability to forfeiture, and to the right of the Crown to re-enter.[2] And, although the Court may possibly have the right to relieve against the forfeiture, if the arrears of rent are tendered, or proceedings are taken, by the evicted galee, within six months, no relief will be given if more than six months are allowed to elapse before tendering the arrears or taking proceedings.[3] In like manner, unless the rules subject to which gales are held are complied with, the gale in respect of which default is made is liable to be forfeited, and the galee to be evicted by the Crown.[4] Where a gale has become liable to forfeiture, the forfeiture is complete on service of a notice to that effect; and an actual re-entry on the part of the Crown is not necessary.[5] Forfeited gales of coal or iron may be re-galed.[6]

Re-gales.

Surrender.

The galee of a gale of coal or iron confirmed by the awards of 1841 may surrender it at the end of any year, on giving six months' previous notice in writing, and leaving the same at the Gaveller's office.[7] The holder of a subsequent coal or iron gale may surrender it at the end of two years from the grant thereof, on giving three months' previous notice; or at the end of any subsequent year, on giving six months' previous notice; such notices to be in writing, and to be left at the Gaveller's office.[8] The galee or lessee of a quarry may surrender it at Michaelmas in any year, on giving three months' previous notice in writing, and leaving the same at the Gaveller's office.[9] At the expiration of the requisite notice the gale or lease in question becomes void; and no deed or other act of surrender is necessary.[10] Surrenders of gales other than by notice, and surrenders of parts of gales,

[1] 34 & 35 Vict. c. 85. s. 34.
[2] *Re* Brain, 18 Eq. 389.
[3] *Ib.*
[4] 1 & 2 Vict. c. 43, s. 29; 24 & 25 Vict. c. 40, s. 3. Qu., whether s. 14 of the Conv. Act, 1881, applies to gales.
[5] *Ex parte* Young, 50 L. J. Ch. 221.
[6] 1 & 2 Vict. c. 43, s. 29.
[7] C. award, sch. 2, r. 6; I. award, sch. 2, r. 6.
[8] *Ib.*
[9] Q. award, sch. 2, r. 3; 24 & 25 Vict. c. 40, s. 18.
[10] 24 & 25 Vict. c. 40, s. 19.

may also be made, and accepted by the Gaveller; on such terms and conditions as he shall think expedient.[1] And surrenders of leases of quarries or works; or of land leased in connexion with gales, quarries, or works; may be made, and accepted by the Gaveller; on such terms and conditions as he shall think expedient.[2]

Rights and duties incident to surrender.

Every coal or iron galee, surrendering before his gale is worked out, must leave all roads and passages used by him in a free and open state for the succeeding galee. And every quarry galee must, upon surrendering, leave the quarry, and the roads and drains belonging thereto, in fair working condition.[3] A surrenderee of a coal or iron gale is allowed six months from the surrender to remove all minerals then lying on banks, and all machinery erections and buildings used by him. And a surrenderee of a quarry gale or lease is allowed three months from the surrender to remove all stone then worked for sale, and all machinery and buildings used by him. But the act of removal must not be so done as to cause any wilful or unnecessary impediment to the Crown, or to the entering galee or lessee.[4]

Re-grants.

Surrendered coal or iron gales may be re-galed. And surrendered quarry gales or leases; and surrendered leases of land used in connexion with any gale, quarry, or work; may be the subject of future leases.[5] The Gaveller or Deputy may, with the consent of the owners, and on the necessary previous surrenders being made, divide two or more gales or parts of gales; and he may regrant them, on such terms and conditions as he may deem proper, to the persons entitled.[6]

(η) *Stamps.*

Stamps.

All instruments made by or on behalf of the Crown in relation to the Forest or Hundred are exempt from stamp duty.[7]

[1] S. 20; 34 & 35 Vict. c. 85, s. 33.

[2] 24 & 25 Vict. c. 40, s. 20. Surrenders are required to be registered like transfers; but non-registration does not avoid them: *ib.*

[3] C. award, sch. 2, r. 15; I. award, sch. 2, r. 15; Q. award, sch. 2, r. 3.

[4] C. award, sch. 2, r. 8; I. award, sch. 2, r. 8; Q. award, sch. 2, r. 4.

[5] See 24 & 25 Vict. c. 40, s. 20.

[6] S. 21.

[7] S. 22. As to the costs of litigation between the Crown and a free miner, see James *v.* The Queen, 17 Eq. 516, 517; *Re* Brain, 18 Eq. 410; James *v.* The Queen, 5 Ch. D. 162; *Ex parte* Young, 50 L. J. Ch. 221.

c. Mutual Rights of Private Owners and Free Miners.

Private owner entitled to moiety of rent.

A private owner of inclosed land in the Hundred, not being in the Forest,[1] is entitled to one-half of the net rent or royalty payable by free miners in respect of the minerals gotten thereunder; and, if there are more than one such owner, an apportionment will be made by the Gaveller or Deputy. And disputes with respect thereto are referable to arbitration.[2]

Workings—generally.

The erection of steam-engines or dwelling-houses in inclosed land is unlawful without the previous consent in writing of the owner.[3] And where a coal or iron gale, pit, or level, is opened within inclosed land, no building can be erected or work made except such as the Gaveller may consider absolutely necessary; and in the manner least injurious to the inclosed land.[4] A quarry galee or lessee, in working near the boundary of any patch or freehold land, must not carry forward his workings so as to injure the same, or the wall or fence or other boundary thereof, without the previous consent of the owner. And he must leave so much space on the outside of any such patch or freehold land, as may be necessary for the protection of the boundaries, and for the continuance of any adjoining carriage or bridle-road or footpath.[5]

Surface damage.

The owners of inclosed lands in the Hundred, whether they are also in the Forest or not, are entitled to compensation from the miners for surface damage. The compensation may consist of an annual payment, or a sum in gross: it may be absolute or conditional; and it is assessable by the Gaveller or Deputy. After assessment, it is recoverable in an action of debt; and, until payment is made, the working in respect of which the assessment is made may not be proceeded with.[6] The expression 'inclosed lands' does not apparently include a dwelling-house standing on uninclosed land, and open on three sides.[7] And the expression 'surface damage' means damage done to the surface by such

[1] The wood known as the Abbot's Wood is deemed uninclosed land within the Forest for the purposes of 1 & 2 Vict. c. 43, and 24 & 25 Vict. c. 40: see 33 Vict. c. viii., s. 9.

[2] 1 & 2 Vict. c. 43, s. 67.

[3] S. 69.

[4] C. award. sch. 2, r. 23; I. award, sch. 2. r. 21.

[5] Q. award, sch. 2. r. 8.

[6] 1 & 2 Vict. c. 43, s. 68; 24 & 25 Vict. c. 40, s. 16: see Allaway *v.* Wagstaff, 4 H. & N. 681.

[7] Allaway *v.* Wagstaff, *u. s.*

acts as sinking a shaft through it, or making a road on it; and it does not include damage caused by withdrawing support from it.[1] Free miners are not, however, exempt from liability in an ordinary action for wrongfully withdrawing such support.[2]

d. Mutual Rights of Free Miners.

(*a*) *Grants.*

Priority of applications.

Gales must be granted to free miners in the order of their applications in writing; and the entry of applications in the books of the Gaveller or Deputy is evidence of the priority of applications.[3] If there are more than one application on the same day for the same gale, the person entitled must be determined by lot.[4] Before, however, the actual grant, an applicant for a gale has no estate or interest legal or equitable. It is perhaps open to him, if there has been delay or other misconduct on the part of the Gaveller or his Deputy, to obtain a mandamus. But the duties of the Gaveller, or his Deputy, are purely ministerial; and he has no other remedy.[5] If, therefore, he dies before the gale has been actually granted, his right is not transmissible to his heir or devisee. It is altogether lost. And it is immaterial that the Gaveller may have been for a long time deterred by the claims of other free miners from making the grant.[6] Where several persons have applied for a grant of the same gale, and a grant has been made to one, the rights of all the other applicants are extinguished. And, if the gale is subsequently forfeited, the first applicant after the forfeiture, and not the next on the list of former applicants, is entitled to the gale.[7] The first applicant after notice of a forfeiture is entitled to priority over the first applicant after a re-entry; a forfeiture being complete on service of the notice.[8]

No right to more than three gales.

No free miner is entitled to have more than three gales

[1] *Ib.*, p. 687: cf. s. c. p. 307.

[2] *Ib.*, p. 681. See *ante*, pp. 351, *et seq.*

[3] 1 & 2 Vict. c. 43, s. 60.

[4] *Ib.*

[5] See James *v.* The Queen, 5 Ch. D. 153, 159, 161, *per* James and Baggallay, L.JJ.

[6] *Ib.*; overruling S. C. 17 Eq. 502. On the other hand, the applicant may withdraw his application at any time before the grant is actually made. *ante*, p. 483.

[7] James *v.* The Queen, 5 Ch. D. 153, *per* Malins, V.-C.

[8] *Ex parte* Young, 50 L. J. Ch. 221: see *ante*, p. 492.

granted to him at any one time. Nor is he entitled to have any other gale granted to him, unless one or more of the three shall have been exhausted; notwithstanding that he may have disposed of the previously granted gale or gales.[1] But where a free miner has obtained grants of three several gales; and has (before working it out) surrendered one of them, on the ground that it did not contain sufficient coal to make it worth the working; it will be treated as exhausted, so as to entitle him to a fourth gale.[2]

Publications—interference with existing gales.

No gale can be granted, unless fourteen days' notice of the application shall have been published by the Gaveller or Deputy in a newspaper or newspapers circulating in Gloucestershire, specifying the day and hour and place of the intended grant.[3] And gales may not be granted, which may interfere with existing gales.[4] Subject to this, however, any vein of coal or iron, which lies under or near a vein already galed, may itself be galed. And a galee has no title to a vein which is not actually included in his gale.[5]

Proceedings to restrain grants.

If one applicant for a gale desires to restrain the Gaveller from making a grant to another, he should present a Petition of Right to the Queen; making the other applicant a party.[6] But the Gaveller or his Deputy is not, it seems, a proper party to an action by one applicant to restrain another from applying for or accepting a grant.[7]

(β) *Boundaries.*[8]

Boundaries.

The Gaveller or Deputy may settle disputes as to boundaries; and, with the consent of the adjoining owners, he may alter the boundaries between adjoining gales or workings.[9] Where the

[1] 1 & 2 Vict. c. 43, s. 61.

[2] Ellway *v.* Davis, 16 Eq. 294; James *v.* The Queen, 5 Ch. D. 153.

[3] 1 & 2 Vict. c. 43, s. 56.

[4] S. 62.

[5] C. award, sch. 2, r. 2; I. award, sch. 2, r. 2.

[6] See *Re* Brain, 18 Eq. 389; *Ex parte* Young, 50 L. J. Ch. 221.

[7] See Davis *v.* Howard, referred to in 17 Eq. 503; 5 Ch. D. 154. In Matthews *v.* Carlisle, 14 L. T. 306, an injunction was obtained against the Gaveller; but this was before 23 & 24 Vict. c. 34 (Petition of Right Act).

[8] See *ante*, pp. 480, n. [5]; 484. Questions as to metes and bounds are questions between the different miners, rather than between the Crown and any particular miner: A.-G. *v.* Jackson, 5 Ha. 367.

[9] 24 & 25 Vict. c. 40, s. 23; see Q. award, sch. 2, r. 7.

boundary of a gale is a barrier of coal lying between such gale and any adjoining gale, the Gaveller or Deputy may, if he thinks that the working may safely be proceeded with, grant to the owners on the two sides; or to the owner, for whose protection the barrier appears to have been left; license to work and dispose of the coal in such barrier. But such grant must be subject to a royalty, conditions, and rules, similar to those applicable to the remainder of the coal belonging to such owners or owner; and to such other conditions as the Gaveller may think proper. And before any such license can be granted, notice of the intention to grant it must be published in a newspaper circulating in the Forest of Dean; and all persons who would be affected by such grant are entitled to be heard against it.[1]

(γ) *Workings.*

Right to use roads.

The railroads and other roads, which a coal or iron galee, or a quarry galee or lessee, is allowed to make and use,[2] may be also used by the owners of other works, upon payment of reasonable compensation; the amount of which is, if necessary, determinable by arbitration.[3]

Duty not to impede other workings.

A coal or iron galee may not work so as to impede or injure the workings of other gales; and a quarry galee or lessee may not place his spoil bank so as to impede or interrupt the workings of an adjoining or other quarry.[4] Where, however, a gale of coal was granted; and a condition was imposed on the galee, that the underlying veins of coal might be subsequently galed to other persons, but with the proviso that the prior galee was not to be thereby impeded or injured; and the underlying veins were subsequently galed, with a license to sink a shaft to them from the surface through the coal of the prior galee; and the only practicable way of reaching the underlying veins was by sinking such a shaft; the subsequent galee was held entitled to sink it. The proviso was construed as being a restriction on

[1] 24 & 25 Vict. c. 40, s. 24.

[2] See *ante*, p. 488.

[3] C. award, sch. 2, r. 3; I. award, sch. 2, r. 3; Q. award, sch. 2, r. 2.

[4] C. award, sch. 2, r. 2; I. award, sch. 2, r. 2; Q. award, sch. 2, r. 5.

the mode of working the underlying veins after they had been reached; but not before.[1]

Duty to leave barriers.

Every coal galee of later creation than the awards of 1841 is obliged to leave barriers of coal in each vein of such width, and in such situation, as the Gaveller may direct.[2]

Duty to prevent escape of water.

The owner of a higher gale, not drained by any steam-engine, who wilfully or negligently allows water from his gale to fall into a lower gale, is liable to the lower galee for all damage which may ensue.[3] The liability in respect of water of a higher galee is not, however, confined to this. The owner of a higher coal gale, which is drained by steam-engines, and from which by the stopping of the engines water would be thrown into a lower gale, is bound, so long as he continues to hold possession, so to work his engines, as to prevent water from his gale from falling into the lower gale.[4] And the liability of a higher iron galee is even greater. He is under a similar obligation to that of a higher coal galee with respect to the working of his engines. And he is, in addition, liable to compensate the lower galee for all damage from any escape of water from his gale, although he may have worked his engines properly, and have been wholly unable to prevent the damage; the amount of such compensation being, if necessary, determinable by arbitration.[5] On the other hand, the owner of a dip gale is bound to prevent water from accumulating therein, and rising above the level of his workings, to the injury of the land galee.[6] Where any gale is drained by a steam-engine or other machinery; and it lies above any other gale, also worked by a steam-engine; and it is worked out or abandoned before the dip gale; the land

[1] Goold *v.* G. W. Deep Coal Co., 2 De G. J. & S. 600; affirming S. C. 12 L. T. N. S. 842. The principle applied was that of a way of necessity: see, as to this, *ante*, p. 372. In the great majority of cases, the Gaveller would probably, in granting the subsequent gale, make it a condition, that general compensation should be made by the galee, for damage occasioned by his workings to the prior galee. In the absence of such a condition, however, the prior galee could obtain no compensation for such damage: see Goold *v.* G. W. Deep Coal Co., *u. s.*, 608, *per* Lord Westbury.

[2] C. award, sch. 2, r. 18.

[3] R. 19; I. award, sch. 2, r. 18.

[4] C. award, sch. 2, r. 19. See Ross *v.* Rugge-Price, 1 Ex. D. 269; Brain *v.* Thomas, 50 L. J. Q. B. 662.

[5] I. award, sch. 2, r. 18. As to the law, in the absence of contract, see *ante*, pp. 403, *et seq.*

[6] C. award, sch. 2, r. 19; I. award, sch. 2, r. 18.

galee must leave at the usual or last known residence of the dip galee three months' previous notice in writing of his intention to discontinue the working of the engine.[1]

Remedies for non-compliance with rules.

If the rules, according to which a galee should work, are not complied with, compliance may be enforced by an injunction in the Queen's Bench Division at the suit of the adjoining galee.[2] And, if necessary, the injunction may, it seems, be mandatory.[3] If the adjoining galee has been injured by a non-compliance, he may also bring an ordinary action for damages.[4] And it is not necessary for him to show a previous notice to the defendant of the injurious consequences of the non-compliance.[5] A mortgagor, in possession and working, may be made liable in such an action. But not a mortgagee, who has never been in possession.[6]

c. Trespassers.

Trespassers.

The Verderers of the Forest have power to inquire into all trespasses by cutting, taking, or carrying away of turf, gravel, stone, sand, or other soil within the Forest; and to prosecute the persons guilty of the same; and, upon conviction, to fine the offenders any sum not exceeding £20; and to direct the trespasses to be abated. But if any person proceeded against insists, that the trespass was not committed within the Forest boundaries, the Verderers cannot proceed to conviction; but are obliged to certify to the Attorney-General, in order that proceedings by information or otherwise may be taken.[7]

[1] C. award, sch. 2, r. 8; I. award, sch. 2, r. 8.

[2] 1 & 2 Vict. c. 43, s. 29.

[3] See Brain *v.* Thomas, 50 L. J. Q. B. 663. *per* Lord Selborne.

[4] Ross *v.* Rugge-Price, 1 Ex. D. 269; Brain *v.* Thomas. *u. s.*, 662.

[5] Ross *v.* Rugge-Price, *u. s.*, 272.

[6] Brain *v.* Thomas, *u. s.*

[7] 10 Geo. 4. c. 50, s. 100; 1 & 2 Vict. c. 42, s. 14; 24 & 25 Vict. c. 40, s. 25.

CHAPTER XXI.

DERBYSHIRE RIGHTS, COURTS, AND CUSTOMS— REMAINING LOCAL RIGHTS AND CUSTOMS.

Sect. 1.—DERBYSHIRE RIGHTS, COURTS, AND CUSTOMS.

a. Generally.

Rights of property.

The right of property in the mines and veins of lead ore in a district within the Hundred of High Peak, in the county of Derby, called the King's Field, and in certain other parts of the same Hundred; and in a district within the Soke and Wapentake of Wirksworth or Low Peak, in the same county, called the King's Field; and in certain duties payable in respect of such mines and veins; is vested in the Crown, as part of the possessions of the Duchy of Lancaster.[1] The right of property in the mines and veins of lead ore in the manors of Ashford, Hartington, Peak Forest, Tideswell, Crich, Stoney Middleton and Eyam, Youlgreave, and Litton, in the same county; and in certain duties payable in respect thereof; is in the hands of various private persons.[2] The right of property in the land containing the mines, in respect of which the duties are payable, is in the hands of various other private persons.[3] These various rights are subject[4] to an ancient customary right in all the

Customs.

[1] See the preambles of 14 & 15 Vict. c. 94; 15 & 16 Vict. c. clxiii. See Arkwright *v.* Gell, 5 M. & W. 204: Arkwright *v.* Evans, 49 L. J. M. C. 82.

[2] See the preamble of 15 & 16 Vict. c. clxiii. There can be no doubt, that in each case the right of property, strictly speaking, extends to the mines as well as the duties; and, under certain circumstances, the mines may be forfeited to the owners of the duties: see *infra*, c. (δ).

[3] See 14 & 15 Vict. c. 94, sch. 1; 15 & 16 Vict. c. clxiii, sch. i.

[4] The whole of the King's Field in early times belonged to the Crown, and the customary rights and duties as to mining therein originated while it so belonged. The Crown subsequently made grants of the soil to private persons; but these grants of necessity only operated subject to the customary rights and duties. Prac-

subjects of the realm to search for and dig the mines and veins of lead ore, on payment of the above-mentioned duties.[1] The miners have also customary rights as between themselves. And they are subject to customary rights in favour of tithe owners; creditors; and persons, who 'relieve' the mines. All these rights are now regulated by statute.[2] And questions relating thereto are decided in the Great and Small Barmote Courts.[3]

Statutes and Courts.

In the Acts in question[4] the following words or expressions have or include the following meanings:—In each Act the words "mine or mines, vein or veins," mean a mine or mines, vein or veins of lead ore; and include parts of or shares in any mine or vein, as well as entire mines and veins, and all minerals containing lead ore. In each Act the words "mineral property" include mines and veins of lead, and parts of or shares in any such mines or veins, and the works, rights, and appurtenances connected therewith, and also lead ore; and all tools, materials, goods, chattels, and effects used in searching for, getting, cleansing, or preparing lead ore, whether such tools, materials, goods, chattels or effects be or be found in or upon any mine or works, or elsewhere.[5] In the first Act the word

Statutory meanings of "mine," "vein," "mineral property," and "ore."

tically, therefore, the lead mines were excepted out of every grant; and liberty was reserved to the Crown, and the customary miners as its licensees, to work them: see Wake *v.* Redfearn, 43 L. T. 123; Wake *v.* Hall, 7 Q. B. D. 297; 8 App. Cas. 211. As to Eyam, see *post*, p. 502, n. [8].

[1] See the preambles of 14 & 15 Vict. c. 94; 15 & 16 Vict. c. clxiii: see also Wright *v.* Pitt, 3 Ch. 811.

[2] Those existing in High Peak are principally regulated by the High Peak Mining Customs and Mineral Courts Act, 1851, 14 & 15 Vict. c. 94 (see s. 16); and the articles and customs comprised in the schedule thereto, which have the force of statute (s. 1; Wake *v.* Hall, 8 App. Cas. 198, 206, 211). They are also in part regulated by certain New Customs, entitled "New and Additional Customs, Articles, Rules, and Orders," established under the provisions of s. 56 of that Act, by the Steward and Grand Jury at a Great Barmote Court held at Monyash on the 5th of April, 1859; and afterwards duly sanctioned by the Duke of Devonshire, as lessee of the duties of 'lot' and 'cope,' by the Chancellor of the Duchy of Lancaster, and by Parliament. In Wake *v.* Hall, *u. s.*, 198, Lord Blackburn inadvertently stated, that the powers of s. 56 had not been exercised. The rights existing in the other districts are regulated by the Derbyshire Mining Customs and Mineral Courts Act, 1852, 15 & 16 Vict. c. clxiii (see ss. 25, 65); and the articles and customs comprised in the schedule thereto, which have the force of statute (s. 1).

[3] See 14 & 15 Vict. c. 94. s. 7; 15 & 16 Vict. c. clxiii, s. 16.

[4] 14 & 15 Vict. c. 94; 15 & 16 Vict. c. clxiii: see *supra*, n. [2].

[5] See s. 2 of each Act: New Cust. a. 59.

'ore' means lead ore, and 'belland' exclusively.[1] And in the second the word 'ore' means lead ore exclusively.[2]

Doubt as to application of Met. Mines Reg. Act.

It has been doubted, whether the Met. Mines Reg. Act, 1872, applies to Crown mines subject to the Derbyshire custom.[3] But, apparently, this doubt is not well founded.[4]

Admissibility of evidence of custom as to adjoining manor.

Evidence of what has taken place in one manor in Derbyshire may, it seems, be admitted for the purpose of explaining or showing the custom in another; even where the question is with respect to the right to minerals as between a lord and the tenant.[5]

b. Barmote Courts.

(a) *Generally—Officers and Functionaries.*

Districts and jurisdictions.

There are or may be a Great and a Small Barmote Court for each of the following districts:—(1) High Peak; (2) Wirksworth; (3) the united manors of Ashford, Hartington, Peak Forest, and Tideswell; (4) the united manors of Stoney Middleton, and Eyam; (5) Crich; (6) Youlgreave; and (7) Litton.[6] The jurisdiction of the Courts for High Peak extends over the whole of the King's Field therein, and over all other parts of the Hundred of High Peak in which the duties are payable.[7] The jurisdiction of the Courts for the Soke and Wapentake of Wirksworth extends over the whole of the King's Field therein. And the jurisdictions of the Courts for the manors extend (except, possibly, as to certain parts of Eyam[8]) over them respec-

[1] See s. 2. Belland is what remains in the dirt after the 'smytham,' or offal ore, has been taken away: see A.-G. *v.* Wall, 4 B. P. C. 666.

[2] See s. 2.

[3] See Arkwright *v.* Evans, 49 L. J. M. C. 82, 87.

[4] Under s. 39 of the Act, and under s. 1 of the Met. Mines Reg. Act, 1875, Barmasters are charged with certain specified duties: see *post*, Chap. XXIV, Part A., Sect. 9, (*β*).

[5] See Ely *v.* Warren, 2 Atk. 189; Anglesey *v.* Hatherton, 10 M. & W. 237: cf. Rowe *v.* Brenton, 8 B. & C. 758. This forms an exception to the general rule: see *ante*, p. 100.

[6] 14 & 15 Vict. c. 94, s. 6; 15 & 16 Vict. c. clxiii. ss. 11, 12, 13, 14, 15.

[7] 14 & 15 Vict. c. 94, s. 16.

[8] The owners of certain lands within Eyam, called 'ancient freeholds,' have always claimed to be exempt in respect of such lands from all mineral customs, and from the jurisdiction of the Barmote Courts. And this claim is not prejudiced by the Acts relating to the Derbyshire Mining Customs and Mineral Courts; it being provided by 15 & 16 Vict. c. clxiii. s. 26, that, until it shall be found by law, that these lands are subject to such customs and such jurisdiction, they shall not be affected by anything contained in the

tively.[1] The Courts are courts of record;[2] and all the respective jurisdictions are separate and distinct.[3]

Officers and functionaries.

The jurisdictions are exercised by the Stewards;[4] or, in case of their illness, or accidental absence, by their Deputies;[5] with the assistance of the 'Barmasters,' and 'Deputy Barmasters.'[6] There are one Steward and one Barmaster for each district possessing a Great and a Small Barmote Court;[7] but (as regards the districts other than High Peak) the same person may be Steward for more than one of them.[8] Each Barmaster may have several Deputy Barmasters.[9]

Times and places for holding Courts.

Great Barmote Courts are held at the following times and places:—For High Peak, twice in the year at Monyash in the King's Field therein:[10] for Wirksworth, twice in the year at Wirksworth:[11] for the united manors of Ashford, Hartington, Peak Forest, and Tideswell, once in the year at such place within the jurisdiction as the Steward appoints:[12] for the united manors of Stoney Middleton and Eyam, once in the year at such place within the jurisdiction as the Steward appoints;[13] and for Youlgreave and Litton, as often in the year in Youlgreave and Litton, as the persons respectively entitled to the first estate of freehold in the mineral duties payable in Youlgreave and Litton may at their discretion think proper.[14] And a Court may be held at Crich; but need not be held, unless the Steward so

Acts. The onus is, therefore, on those who allege, that such lands are subject to the customs and the jurisdiction, to prove their allegation: see Wright *v.* Pitt, 12 Eq. 408, 416.

[1] 15 & 16 Vict. c. clxiii, s. 25.

[2] 14 & 15 Vict. c. 94. ss. 8, 15; 15 & 16 Vict. c. clxiii, ss. 17. 24.

[3] Wake *v.* Redfearn, 43 L. T. 125.

[4] 14 & 15 Vict. c. 94, ss. 3, 15; 15 & 16 Vict. c. clxiii. ss. 3, 24. As to their appointment and qualifications, see 14 & 15 Vict. c. 94, s. 3; 15 & 16 Vict. c. clxiii, ss. 4, 6, 7. 8.

[5] 14 & 15 Vict. c. 94, s. 4; 15 & 16 Vict. c. clxiii, s. 9.

[6] 14 & 15 Vict. c. 94, s. 9; 15 & 16 Vict. c. clxiii, ss. 18. 19. As to their appointment and removal, see 14 & 15 Vict. c. 94, ss. 9, 11, 12; 15 & 16 Vict. c. clxiii. ss. 6, 18, 19. The lessee under the Crown of mineral duties cannot hold the office of Barmaster: see Arkwright *v.* Cantrell. 7 A. & E. 565. See, as to the protection of the officers of the courts, 14 & 15 Vict. c. 94. ss. 10, 21, 42. 43, 51; 15 & 16 Vict. c. clxiii, ss. 20. 30, 50, 51, 59.

[7] 14 & 15 Vict. c. 94. ss. 3. 9; 15 & 16 Vict. c. clxiii, ss. 3. 4, 6, 12, 18, 19.

[8] 15 & 16 Vict. c. clxiii, s. 7.

[9] 14 & 15 Vict. c. 94, s. 9; 15 & 16 Vict. c. clxiii, ss. 6, 18, 19.

[10] 14 & 15 Vict. c. 94. s. 6; New Cust. a. 22.

[11] 15 & 16 Vict. c. clxiii, s. 11.

[12] S. 12.

[13] *Ib.*

[14] Ss. 14, 15.

desires.[1] Small Barmote Courts for High Peak are held at any place within the jurisdiction which the Steward appoints:[2] for Wirksworth, in Wirksworth;[3] and for the manors, at such places within the manors as the Stewards appoint.[4] And they are held as often as is necessary.[5]

Business transacted at Courts.

The principal business transacted at a Great Barmote Court is the swearing in of the Grand Jury:[6] at a Small Barmote Court, the trial of actions of title, trespass, and debt.[7]

Duties of Stewards, Barmasters, and Deputy Barmasters.

The duties of the Stewards are to attend and preside at 'views of mines;'[8] to hold and preside at the Courts; to hear and determine applications to the Courts, which do not require the intervention of a jury, and make orders thereon; to tax costs; and to perform various ministerial acts in the course of actions.[9] The duties of the Barmasters are to select the Grand Jury; to make out a list of jurors to attend at the Small Barmote Courts; to execute all precepts and warrants directed to them by the Stewards; to attend 'views of mines;'[8] to set out 'gifts;'[10] and to assist in regulating the working of the 'mines,' and the rights and duties of the miners.[11] The duties of the Deputy Barmasters are to serve summonses in actions in the Small Barmote Courts; to serve summonses on jurors; to attend 'views of mines;'[8] to collect the dues payable to the Crown, or other persons entitled thereto, and keep accounts of such dues; to keep their Barmaster's book, and make en-

[1] S. 13. If not held, the grand jurors and other jurors for Wirksworth perform the duties in Crich: *ib.*

[2] 14 & 15 Vict. c. 94, s. 6; New Cust. a. 24.

[3] 15 & 16 Vict. c. clxiii, s. 11.

[4] *Ib.*

[5] 14 & 15 Vict. c. 94, ss. 6, 24; 15 & 16 Vict. c. clxiii, ss. 11, 33.

[6] 14 & 15 Vict. c. 94, s. 7; 15 & 16 Vict. c. clxiii, s. 16. New rules and customs for High Peak may be made at the Great Barmote Courts for that district: see 14 & 15 Vict. c. 94, s. 56. This right has since the Act been only once exercised: see *ante*, p. 501, n. [2]

[7] 14 & 15 Vict. c. 94, s. 7; 15 & 16 Vict. c. clxiii, s. 16. Parties are not precluded from proceeding in any other court which has jurisdiction: 14 & 15 Vict. c. 94, s. 55; 15 & 16 Vict. c. clxiii, s. 63.

[8] See next page.

[9] 14 & 15 Vict. c. 94, s. 5; 15 & 16 Vict. c. clxiii, s. 10.

[10] See *infra*, c (α).

[11] 14 & 15 Vict. c. 94, ss. 2, 13, 22, 34, 35; 15 & 16 Vict. c. clxiii, ss. 2, 22, 31, 43, 45. The Barmasters have also duties under the Met. Mines Reg. Acts, 1872 and 1875: see *post*, Chap. XXIV, Part A., Sect. 9, (β) The Barmasters had formerly a quasi-criminal jurisdiction (see Arkwright *v.* Cantrell, 7 A. & E. 573, 574); but this no longer exists.

tries therein of all 'meers'[1] of ground which may be set out, and of all transfers of 'mines' which may be made by the miners, and of all 'freeings'[2] connected with the 'mines;' and, generally, to assist their Barmasters.[3]

Grand Jurors — views.

The Grand Jurors are, as far as possible, persons skilled in practical mining.[4] Their duties are to attend at the Great Barmote Courts; to go down into and view 'mines,' and give their opinion on such matters as may be required of them in any 'bill' or 'cross bill of directions;' and to assist in regulating the working of the 'mines,' and the rights and duties of the miners.[5] And the performance of their duties is enforceable under penalties.[6] 'Views of mines' by the Grand Jury within any district may be had at the instance of the Barmaster, or of the plaintiff or defendant in any action of title or trespass in a Small Barmote Court, or of any miner or other person.[7] The person requiring a 'view' delivers to the Steward a 'bill of directions,' describing the object to be viewed, and stating the question on which the opinion of the Grand Jury is required;[8] and any person, who may be affected by the opinion of the Grand Jury, may deliver a 'cross bill of directions.'[9] Neither bill is allowed to contain any argument or comment.[10] The Steward reads and delivers the bill, and the cross bill (if any), to the Grand Jury;[11] who make the 'view,' and then write their opinions, and sign them.[12] The bill, and the cross bill (if any), with the opinions, are afterwards delivered to the Steward;

[1] See *infra*, c (α).

[2] See *infra*, c (β).

[3] 14 & 15 Vict. c. 94, s. 14; New Cust. a. 23; 15 & 16 Vict. c. clxiii, s. 23.

[4] 14 & 15 Vict. c. 94, s. 22; New Cust. aa. 13, 14, 15, 17; 15 & 16 Vict. c. clxiii, s. 31. See *ib.*, as to their selection, qualification, and period of service.

[5] 14 & 15 Vict. c. 94, s. 23; New Cust. aa. 15, 16; 15 & 16 Vict. c. clxiii, s. 32.

[6] 14 & 15 Vict. c. 94, s. 38; New Cust. aa. 15, 16; 15 & 16 Vict. c. clxiii, s. 47. As to exemptions in High Peak, see 14 & 15 Vict. c. 94, s. 39. As to their protection, see 14 & 15 Vict. c. 94, sch. 1, a. 25; 15 & 16 Vict. c. clxiii, sch. 1, a. 26.

[7] 14 & 15 Vict. c. 94, sch. 1, a. 22; New Cust. a. 11; 15 & 16 Vict. c. clxiii, sch. 1, a. 23.

[8] *Ib.*

[9] 14 & 15 Vict. c. 94, sch. 1, a. 23; 15 & 16 Vict. c. clxiii, sch. 1, a. 24.

[10] 14 & 15 Vict. c. 94, sch. 1, aa. 22, 23; 15 & 16 Vict. c. clxiii, sch. 1, aa. 23, 24.

[11] *Ib.*

[12] 14 & 15 Vict. c. 94, sch. 1, a. 22: see a. 24; 15 & 16 Vict. c. clxiii, sch. 1, a. 23: see a. 25. The opinions do not, apparently, require to be stamped like an award: see Sybray *v.* White, 1 M. & W. 435, a case before the passing of the Acts.

who openly reads them,[1] and thenceforth preserves them with the documents of the Courts. But, if the 'view' shall have been had in an action, he is obliged, if required by the plaintiff or defendant, to permit them to be used for the purpose of evidence on the trial.[2]

(β) *Proceedings, Appeals, and Execution.*

Proceedings—generally.

An action in the Small Barmote Court of any district is commenced by entering a plaint with the Steward.[3] The Steward then issues a summons, specifying the day when a Court will be held for the trial;[4] and this summons is served on the defendant.[5] Service of subpœnas to give evidence on trials is good in any part of England or Wales; and may be enforced by process from the Queen's Bench Division, if the expenses be tendered.[6] Witnesses may (in High Peak) be examined on oath or affirmation.[7] They are (in all the districts) bound under penalties to give evidence;[8] and, if they give false evidence, they may be punished for perjury.[9] Matters of fact in issue are triable by a jury of owners or maintainers of 'mines' within the jurisdiction, being resident in the county of Derby, and not being members of the Grand Jury.[10] And the performance of their duties is enforceable under penalties.[11] The Steward

[1] 14 & 15 Vict. c. 94, sch. 1, a. 22; 15 & 16 Vict. c. clxiii, sch. 1, a. 23.

[2] *Ib.* As to the expenses of the view, see *ib.* A view, or something very like it, took place in Sybray *v.* White, 1 M. & W. 435.

[3] 14 & 15 Vict. c. 94, s. 5, sch. 1, a. 16; 15 & 16 Vict. c. clxiii, s. 10, sch. 1, a. 16.

[4] 14 & 15 Vict. c. 94, s. 24; 15 & 16 Vict. c. clxiii. s. 33.

[5] See, as to the mode of service in High Peak, 14 & 15 Vict. c. 94. s. 25; New Cust. aa. 28, 29, 30: in the other districts, 15 & 16 Vict. c. clxiii. s. 34.

[6] 14 & 15 Vict. c. 94, s. 31: see s. 40; 15 & 16 Vict. c. clxiii, s. 40: see s. 48.

[7] 14 & 15 Vict. c. 94, s. 18. As to affidavits in High Peak, see New Cust. a. 56.

[8] 14 & 15 Vict. c. 94. s. 20; 15 & 16 Vict. c. clxiii. s. 29.

[9] 14 & 15 Vict. c. 94, s. 19; 15 & 16 Vict. c. clxiii, s. 28.

[10] 14 & 15 Vict. c. 94, ss. 24, 34, 35, 36; New Cust. aa. 18, 19, 21; 15 & 16 Vict. c. clxiii, ss. 33, 43, 45, 46. With respect to some of the districts, if there are an insufficient number of jurors resident therein, the Barmaster may summon persons from the lists provided for the other districts: see 15 & 16 Vict. c. clxiii. s. 44.

[11] 14 & 15 Vict. c. 94, s. 37; New Cust. a. 19; 15 & 16 Vict. c. clxiii, s. 47. See, as to exemptions in High Peak, 14 & 15 Vict c. 94, s. 39; countermanding. New Cust. aa. 20, 39, 45, 46; fees, a. 44.

may adjourn the Court, or the hearing of the proceedings therein.[1] He may (in High Peak) amend proceedings;[2] and he may (in all the districts) grant new trials, and set aside judgments, and stay proceedings.[3] He may also (in High Peak) by consent refer proceedings to arbitration; and set aside awards.[4] The party, who has judgment in his favour, is entitled to costs.[5] Where the owners of a 'mine' in High Peak are more than three in number, they may appoint and register with the Barmaster an agent to sue and be sued on their behalf.[6]

Title.

A person claiming title cannot, generally, bring more than one action to recover the same 'mine.'[7] And if the 'mine' is in process of working, he must bring his action within three months after he shall have had notice of the working; or within six months after it shall have been worked, whether he shall have had notice or not.[8] A nonsuit is not a bar to a fresh action, either of trespass, or of debt.[9]

Trespass and debt.

Appeals.

Actions in the Small Barmote Courts may be removed to, and appeals lie to, the Queen's Bench Division.[10]

Execution.

Where the plaintiff in an action of title in a Small Barmote Court obtains judgment; and the defendant refuses to deliver possession; execution may issue, and delivery may be enforced by the Barmaster. And, where a judgment is given, or an order made, to pay any debt or damages, or any money or costs, or where any penalty is imposed; and default is made in pay-

[1] 14 & 15 Vict. c. 94, s. 17; New Cust. aa. 43, 46; 15 & 16 Vict. c. clxiii, s. 27.

[2] New Cust. a. 50.

[3] A. 17 of sch. 1 of each Act.

[4] New Cust. a. 51.

[5] 14 & 15 Vict. c. 94, ss. 28, 53; 15 & 16 Vict. c. clxiii, ss. 37. 61. As to service of judgments and orders in High Peak, see New Cust. a. 48. For the consequence of not proceeding in an action, see 14 & 15 Vict. c. 94. s. 26; New Cust. aa. 37, 41, 46; 15 & 16 Vict. c. clxiii, s. 35. As to confessing claims in High Peak, see New Cust. aa. 32, 36. And as to compromises in High Peak, see *ib.* aa. 31, 46.

[6] New Cust. aa. 9, 10: see also aa. 27, 49.

[7] A. 17 of sch. 1 of each Act. For the form of the summons in an action of title in High Peak, see New Cust. a. 25. Any person not named as a defendant may, by leave, appear and defend.

[8] 14 & 15 Vict. c. 94, sch. 1, a. 21; 15 & 16 Vict. c. clxiii. sch. 1, a. 22.

[9] A. 17 of sch. 1 of each Act. As to the defences of infancy and coverture, and other special defences in actions of trespass and debt in High Peak, see New Cust. aa. 33, 34, 36, 39, 40, 41, 42; as to payment into Court, aa. 35, 36, 38, 39, 40, 41, 42.

[10] 14 & 15 Vict. c. 94, ss. 29, 30, 52; 15 & 16 Vict. c. clxiii, ss. 38, 39, 60.

ment; execution may issue against the 'mineral property'[1] of the defaulter within the jurisdiction, and the property may be sold by the Barmaster. And, if the defaulter has no 'mineral property' within the jurisdiction, or not sufficient to answer the amount in question, the amount or the deficiency may be recovered by an action in the High Court; or, if it does not exceed £50, in the County Court.[2] Necessary or proper buildings or machinery, which a miner erects on the surface under his customary powers,[3] are 'mineral property' within the meaning of these provisions.[4] Claims by a third party to 'mineral property' taken in execution may be determined by an interpleader action in a Small Barmote Court.[5]

c. Mutual Rights of the Crown and other Owners of Mineral Duties and the Miners.

(a) General Right to Search—Meers and Gifts.

General right to search.

Every subject of the realm is entitled, *primâ facie*, to search for, sink, and dig, mines of lead 'ore'[6] upon, in, or under all lands within the jurisdiction of the Courts, except churches, churchyards, places for public worship, burial grounds, dwelling-houses, orchards, gardens, pleasure grounds, and highways.[7] And he may follow and work his 'vein,'[6] and search for and get lead

[1] See *ante*, p. 501.

[2] 14 & 15 Vict. c. 94, ss. 32, 33, 47; 15 & 16 Vict. c. clxiii. ss. 41, 42, 55.

[3] See *infra*, *d*.

[4] See Wake *v.* Hall, 8 App. Cas. 207, 213, 214, *per* Lords Watson and Fitzgerald.

[5] 14 & 15 Vict. c. 94, s. 46; New Cust. aa. 54, 55; 15 & 16 Vict. c. clxiii, s. 54. Execution may in some cases be superseded: see 14 & 15 Vict. c. 94, s. 41; 15 & 16 Vict. c. clxiii, s. 49. As to levying costs in actions by or against executors or administrators in High Peak, see New Cust. aa. 52, 53. Orders made out of court in High Peak for payment of costs are enforceable like judgments: New Cust. a. 47. As to the application of penalties, see 14 & 15 Vict. c. 94, s. 50; 15 & 16 Vict. c. clxiii, s. 56. A register of proceedings is required to be kept by the steward, and all persons wishing to inspect it may do so: see 14 & 15 Vict. c. 94, ss. 44, 45; 15 & 16 Vict. c. clxiii, ss. 52, 53. For forms of proceedings, see sch. 2 of each Act; New Cust. a. 25. And for fees and payments, see schedules 3 and 4 of each Act; New Cust. aa. 57, 58.

[6] For the meanings of vein and ore, see *ante*, pp. 501, 502.

[7] A. 1 of sch. 1 of each Act. As to the jurisdiction of the Courts, see *ante*, p. 502. For a statement of the custom in High Peak before the passing of the Acts, see A.-G. *v.* Wall, 4 B. P. C. 665. Before the passing of the Acts the custom in Wirksworth was said to

'ore,' under the excepted lands in High Peak, and at a lower depth than fifteen yards from the surface under the excepted lands in the other districts. But, as regards his rights in the latter respects, all damage done by him may be recovered in an action[1] at the suit of the owner or occupier. And, as regards the same rights, the working may be suspended or regulated by the Steward and Grand Jury; in case, in High Peak, the owner or occupier apprehends, that the security of the excepted lands will be endangered; and, in case, in the other districts, the owner or occupier apprehends that the working is carried on at a less depth than fifteen yards from the surface, or that the security will be endangered.[2] A subject does not possess his rights the less, because he happens to be the owner of the soil which incloses the minerals.[3] Nor, on the other hand, does he lose his rights by becoming the lessee under the Crown of the mineral duties.[4] He may, however, contract himself out of his rights; and he effectually does so by accepting a lease or licence with respect to the minerals in question.[5]

Meers and gifts—generally.

If any new 'vein' is found by any person in High Peak, and 'ore' is raised therefrom, the following consequences ensue. The first finder is entitled to two 'meers' in length of the 'vein,' one on each side of the 'founder,' or point at which the 'vein' is first found;[6] or to any less quantity; to be set out by the Barmaster in the presence of two of the Grand Jury.[7] The Crown or its lessees are entitled to the third 'meer;' to be set

be, "to dig for lead in another's soil as far as one can throw his mattock:" see Lynn Regis *v.* Taylor, 3 Lev. 160. See also Rowls *v.* Gells, 2 Cowp. 451. It was necessary, in pleading the custom, to plead it with certainty; and to allege its existence in some manor, vill, parish, or hundred. It would not, for instance, have been sufficient to allege its existence in the King's Field. See Beresford *v.* Bacon, 2 Lutw. 1317. It was, in a case before the passing of the Acts, held that 'gardens' included a place planted with shrubs six years, and with potatoes immediately, before the transaction in question took place: Gilbert *v.* Tomison, 4 D. & R. 222. See, generally, for the customs before the Acts, and for a glossary of terms, Mander's Derbyshire Miner's Glossary.

[1] In the County Court, if the damage does not exceed £50: otherwise in the High Court: a. 1 of sch. 1 of each Act.

[2] A. 1 of sch. 1 of each Act.

[3] See Wake *v.* Hall, 7 Q. B. D. 298.

[4] See Arkwright *v.* Evans, 49 L. J. M. C. 86, *per* Lord Coleridge.

[5] See Wright *v.* Pitt, 12 Eq. 408, 416.

[6] 14 & 15 Vict. c. 94, s. 2.

[7] 14 & 15 Vict. c. 94, sch. 1, aa. 10, 11, 18.

out, at the option of the Barmaster, at either extremity of the two first or 'founder meers.'[1] And the finder is entitled to each subsequent 'meer,' each way, to the extent which he may claim or require at the time of 'freeing' the 'founder meers.'[2] If any new 'vein' is found in any of the other districts, and 'ore' is raised therefrom, the following consequences ensue. The first finder is entitled to two similar 'meers,' or to any less quantity; to be similarly set out.[3] The Crown or its lessees, or the other owner of the mineral duties, is entitled to the third 'meer;' to be set out in halves at either extremity of the 'founder meers.'[4] The finder is entitled to each subsequent 'meer,' not exceeding fifty 'meers' in the 'vein,' to the extent which he may claim or require at the setting out of the 'founder meers.' And such subsequent 'meers' may be set out either wholly in one direction in the 'vein,' or partly in one direction and partly in the other, as the miner may choose at the time of setting out the 'founder meers.'[5] A 'meer' in High Peak, Hartington, Peak Forest, Tideswell, Stoney Middleton and Eyam, and Litton, measures thirty-two yards:[6] in Wirksworth, Ashford, and Crich, twenty-nine yards;[7] and in Youlgreave, twenty-eight yards.[8] The setting out of the 'meers' by the Barmaster is called the 'gift;'[9] and the particulars of each 'gift' are required to be entered in the Barmaster's book.[10]

Non-working of third meer.

If the Crown, or its lessees, or the other owner of the mineral duties, refuses or neglects to work the third 'meer,' the finder may purchase the same at such price as the Steward or Barmaster and Grand Jury may determine. Or he may work through it; upon laying aside for the use of the owner of the

[1] A. 10; s. 2. As to forfeiture for trespassing in the third 'meer,' see *infra* (δ).

[2] A. 10. As to 'freeing,' see *infra* (β).

[3] 15 & 16 Vict. c. clxiii, sch. 1, aa, 10, 11, 18.

[4] A. 10.

[5] *Ib.* In a case before the Acts (Rowls *v.* Gells. 2 Cowp. 451), it was stated, that in Wirksworth the finder was, for the purpose of working the vein, entitled to use seven yards and a quarter of land in breadth adjoining on each side of the vein, so far as it extended in length; which was called the 'quarter cord:' and the Crown was entitled to a meer of ground, with the like privilege of 'quarter cord,' on each side of the founder meer.

[6] A. 18 of sch. 1 of each Act.

[7] 15 & 16 Vict. c. clxiii, sch. 1 a. 18.

[8] *Ib.*

[9] See s. 2 of each Act.

[10] A. 10 of sch. 1 of each Act.

mineral duties all 'ore' which may be gotten therein, after deducting the expenses of getting.[1]

Consolidation of veins.

Any person having two or more veins of lead lying contiguous to each other; or connected by any shafts, gaits, or ways; may, with the consent of the Barmaster or Grand Jury, consolidate the titles to such veins. An entry to that effect is required to be made in the Barmaster's book; and the veins are thenceforth treated as held under one title.[2]

Interest of miner—rateability.

The interests of the miners appear to be freehold in their nature.[3] And, although before the Rat. Act, 1874,[4] a lessee under the Crown, or any other person entitled to the mineral duties, was rateable, as being in receipt of a portion of the mine; and the miner was exempt;[5] it may be doubted, whether the Act has not altered the position of the miner in that respect.[6]

(β) *Freeing Dish—Lot and Cope.*

Freeing dish.

A miner is bound, before obtaining a 'gift,' to pay to the owner of the mineral duties the 'freeing dish,' or so much 'ore' as is sufficient to fill a dish of a specified measurement.[7] And he is bound to pay a similar dish for every third and subsequent 'meer' which he reaches.[8] If, however, he obtains a gift of less than a whole 'meer,' he is only bound to pay a 'freeing dish' of a proportionate amount.[9]

Lot and cope.

Duties of 'lot' and 'cope' are also payable by the miners to the owners of the mineral duties.[10] 'Lot' in High Peak, in Wirksworth, and in the manors other than Crich, is one-thirteenth part of all 'ore' raised: in Crich, one-ninth.[11]

[1] *Ib.*; New Cust. a. 6.

[2] 14 & 15 Vict. c. 94, sch. 1, a. 27; New Cust. a. 12; 15 & 16 Vict. c. clxiii, sch. 1, a. 28.

[3] See Doe *v.* Pearce, 2 Peake's N. P. 244.

[4] 37 & 38 Vict. c. 54.

[5] See Rowls *v.* Gells, 2 Cowp. 451.

[6] S. 13 (as to which, see Van Mining Co. *v.* Llanidloes, 1 Exch. D. 310) can hardly be applicable. For duties, which include 'cope' (as to which see *infra* (β)), would not be "wholly reserved in kind." See *post*, Chap. XXIII, Sect. 4, *b*.

[7] A. 11 of sch. 1 of each Act. As to the measurement, see a. 3 of sch. 1 of each Act.

[8] A. 11 of sch. 1 of each Act.

[9] A. 18 of sch. 1 of each Act. As to forfeiture, see *infra* (δ).

[10] A. 9 of sch. 1 of each Act.

[11] *Ib.* See Rowls *v.* Gells, 2 Cowp. 451. 'Smytham' (*ante*, p. 502, n. [1].) was not, before the passing of the Acts, exempted from the payment of the duties: see A.-G. *v.* Wall, 4, B. P. C. 679. The exemption was

'Cope' in High Peak, and in the manors other than Ashford and Crich, is the sum of fourpence for every load of nine dishes of 'ore,' each dish being of a specified capacity: in Wirksworth, Ashford, and Crich, sixpence for every load of nine dishes.[1] In order to insure due payment of 'cope,' all 'ore' raised is required to be measured by the Barmaster.[2] 'Lot' is set apart and taken by the Barmaster when he measures any 'ore;'[3] and, if necessary, an action for an account will lie for its payment.[4] Payment of 'cope' is enforceable by an action of debt in the Small Barmote Court, or the County Court.[5]

(γ) *Transfer and Devolution.*

High Peak.

Any person may transfer his interest in any 'mine' or 'vein' in High Peak to any other person.[6] The transferor and transferee must both execute a transfer in a specified form;[7] and the consideration for the transfer must be truly stated. On the transfer being presented to the Barmaster or his Deputy, duly stamped and executed, and proof being given of the due execution, it must be entered in the Barmaster's book; and the entry of the transfer is *primâ facie* evidence of its execution.[8] Where any person entitled to any 'mine' or 'vein' in High Peak becomes bankrupt, a certificate of the appointment of his trustee, when presented to the Barmaster, must be entered in his book.[9]

there alleged to be part of the custom, and issues were directed to try the custom at law. As to the statutory meanings of ore, see *ante*, p. 502.

[1] A. 9 of sch. 1 of each Act. As to the capacity of the dish, see a. 3 of sch. 1 of each Act. See Rowls *v.* Gells, 2 Cowp. 451. In A.-G. *v.* Wall (4 B. P. C. 665), a case involving the custom of High Peak before the passing of the Acts, 'lot' was said to be every thirteenth dish dressed and made merchantable, and 'cope' to be 4*d.* for every 'load' of 'ore:' and the 'load' was said to contain about 500 pounds or 9 'dishes;' and the 'dish' was said to be a wooden measure about 21 inches long, 6½ inches broad, and 4 inches deep, in which the ore, when dressed and separated from the dirt and base minerals adhering to it, was immemorially measured.

[2] Aa. 3, 7, of sch. 1 of each Act. In case the Barmaster does not attend, the measurement is made by two persons employed by the miner: a. 7 of sch. 1 of each Act; New Cust. a. 5. As to forfeiture, see *infra* (δ).

[3] A. 9 of sch. 1 of each Act.

[4] A.-G. *v.* Wall, 4 B. P. C. 669.

[5] A. 9 of sch. 1 of each Act.

[6] 14 & 15 Vict. c. 94, sch. 1, a. 6.

[7] See, for the form, New Cust. a. 2.

[8] 14 & 15 Vict. c. 94, sch. 1, a. 6; New Cust. a. 2.

[9] New Cust. a. 3.

And where any person entitled to any 'mine' or 'vein' in High Peak dies, having devised or bequeathed it, the material parts of the probate of his will and codicils (if any), when presented to the Barmaster, must be entered in his book.[1]

Other districts.

In the other districts any person may transfer his interest by causing an entry to be made in the Barmaster's book. And any person may require any grant, conveyance, probate of a will, or other assurance, relating to any 'mine,' to be entered in such book, with all necessary particulars. And every document so entered has priority over all documents not entered; and all documents entered have precedence over each other according to the dates of their entry.[2]

(3) *Forfeiture.*

Non-freeing—non-measurement for duties.

If any 'mine' or 'vein' is worked without being duly 'freed,'[3] it is liable to forfeiture to the owner of the mineral duties payable in respect of it; and possession of it may be recovered in the Small Barmote Court.[4] Miners are bound, under pain of forfeiting to the owners of the mineral duties the value of the 'ore,' or of the 'mine' at which it is gotten, not to sell any 'ore,' or remove it from the 'mine,' until the measurement required for the purposes of 'lot' and 'cope'[5] has been made.[6]

Trespass.

If a miner commits a trespass in the third 'meer' allotted to the owner of the mineral duties,[7] the 'mine,' of which the 'meer' in which the trespass is committed forms a part, is liable to forfeiture to such owner; and possession may be recovered in the Small Barmote Court.[8]

Non-working.

If any 'mine' or 'vein' is neglected and not wrought without sufficient excuse; and remains so for three weeks after notice of the intention to forfeit it shall have been given to the miner or put up at or near the 'mine;' it may be forfeited, and given by the Barmaster to any person or persons willing to work it.[9]

[1] A. 4.
[2] 15 & 16 Vict. c. clxiii, sch. 1, a. 6.
[3] See *ante*, p. 511.
[4] A. 12 of sch. 1 of each Act.
[5] See *ante*, p. 512.
[6] A. 8 of sch. 1 of each Act.
[7] See *ante*, pp. 509, 510.
[8] A. 12 of sch. 1 of each Act.
[9] 14 & 15 Vict. c. 94, sch. 1. a. 19;

d. Mutual Rights of Landowners and the Miners.

Generally.

Some of the relations between the landowners and the miners have been already considered.[1]

User of surface—right to erect buildings, &c.—rights of way and water.

Every miner is entitled, so long as his 'mine' shall be worked, and without making any payment therefor,[2] to the exclusive use of so much of the surface as may be necessary for mining purposes.[3] And (as an incident of this right) he is entitled to erect upon the surface any necessary or proper buildings or machinery, with foundations sunk into the soil; and from time to time to alter their description and character, according as improvements are discovered and introduced.[4] And he is also entitled to rights of way, either on foot or with carts, from the nearest highway to the 'mine,' and from the 'mine' to the nearest running stream, spring, or natural pond; and to use the water from such stream, spring, or pond for mining purposes.[5] But he is subject, as to the exercise of these rights, to the supervision of the Barmaster and two of the Grand Jury, or of the Steward.[6] It is not, however, competent for a miner, who sinks a shaft in the Hundred of High Peak, to use the surface land in that Hundred to dress ore and place spoil or refuse got from the Wapentake of Wirksworth, into which he may have extended his operations.[7] For the Hundred and the Wapentake are distinct, and are governed by different Acts of Parliament.[8] Indeed there is a dictum, that a miner has no

New Cust. a. 7; 15 & 16 Vict. c. clxiii, sch. 1, aa. 19, 20. See, on this subject, as to 'consolidated' veins, 14 & 15 Vict. c. 94, sch. 1, a. 27; 15 & 16 Vict. c. clxiii, sch. 1, a. 28. See Wake *v.* Hall, 8 App. Cas. 202.

[1] *Ante*, p. 509.

[2] Except in certain specified cases; as to which, see a. 5 of sch. 1 of 15 & 16 Vict. c. clxiii.

[3] A. 5 of sch. 1 of each Act. He has, therefore, more than a mere easement on the surface: see Wake *v.* Hall, 8 App. Cas. 214.

[4] See Wake *v.* Hall, 7 Q. B. D. 299; 8 App. Cas. 202, 205, 208, 209, 212, 214, 215. Cf. the somewhat similar rights which are exerciscable independently of custom, *ante*, p. 274.

[5] A. 4 of sch. 1 of each Act. By 15 & 16 Vict. c. clxiii (which applies to the districts other than High Peak) ornamental waters and private fisheries are excepted; and it is provided that, if the way passes over inclosed lands, the miner must make and repair proper gates and stiles, and that the miner must not so use water, as to defile it, or lessen it whereby cattle may be deprived of a sufficiency: sch. 1, a. 4.

[6] Aa. 4, 5, of sch. 1 of each Act.

[7] Wake *v.* Redfearn, 43 L. T. 123.

[8] See *ante*, pp. 501, n. [2], 503.

customary right to use the surface of a particular owner for treating the produce got, not from beneath such surface, but from beneath the surface of another owner, although within the same district.[1] But this dictum has been doubted.[2] And it is at least certain, that, if a miner has the right in question, its exercise, subject as it would be to official supervision, could hardly prejudice the surface owner. And it is equally certain, that, if he has not, he may be at the enormous expense of having to sink a fresh shaft every time he passes from the land of one owner into that of another.[3]

Duty as to fences.

Every miner must make and maintain fences for the protection of cattle from any injury which may arise from his operations.[4]

Right to remove buildings, &c.

A miner, who, in exercise of his right of user of the surface, has erected thereon buildings and machinery reasonably necessary for the working of his 'mine,' is entitled, as against the surface owner, to pull down and remove the materials of such buildings and to remove such machinery, at any time whilst he continues to work, and before he has done any act showing an intention to abandon the 'mine' other than the act of pulling down and removing. And, in the case of such buildings, it is immaterial that they may be made of brick or stone, with foundations sunk into the soil; and that their removal may, therefore, although without destroying it, disturb the soil. For the miner does not stand in the relation of a tenant to, nor has he any privity of title with, the surface owner. His rights, on the contrary, with respect to the erection of buildings and machinery, are paramount to those of the surface owner with respect to the surface. The maxim, *quicquid plantatur solo solo cedit*, does not, therefore, apply to him; nor is he subject to any doctrine founded upon waste. And the fact, that he has incurred a forfeiture, does not in these respects alter his position.[5] And he is equally entitled to exercise these rights

[1] Wake *v.* Redfearn, 43 L. T. 123, *per* Cockburn, C. J.

[2] *Ib.*, *per* Manisty and Bowen, JJ.

[3] See Wake *v.* Redfearn, *u. s.*

[4] A. 5 of sch. 1 of each Act. See Sybray *v.* White, 1 M. & W. 435, a case before the passing of the Acts.

[5] Wake *v.* Hall, 7 Q. B. D. 295, 297, 301, 302, 303; 8 App. Cas. 195, 201, 202, 206, 207, 209, 210, 215, 216. See *ante*, p. 513.

within a reasonable time after he has ceased to work.[1] He is not, however, entitled to remove such buildings after he has allowed a reasonable time to expire, or has otherwise indicated an intention to abandon the 'mine.' And, for this purpose, it is immaterial that he may have received no notice of forfeiture from the Barmaster. For his surface rights are at an end as soon as he becomes a trespasser by remaining upon the land.[2] And if the buildings in question are not reasonably necessary for the working of his 'mine,' he has no right at any time to remove them. For he is in such a case a wrongdoer from the commencement.[3]

Duty as to levelling land and removing buildings.

If a miner fails to find a 'vein,' or discontinues a search, or (in the districts other than High Peak) fails to 'free' the 'founder meers,' he must level or make good the land. Or the landowner may do so; and recover the expenses from him in an action of debt in the Small Barmote Court, or the County Court.[4] And the landowner is entitled to require a miner, on abandoning his 'mine,' to remove all buildings which he has properly erected on the surface; and to restore the surface to its natural state.[5]

Landowners' rights as to minerals, &c., other than lead.

In High Peak the landowner may sell and dispose of the other minerals and rubbish in the lands, and remove the same from the lands, as soon as the lead ore has been extracted therefrom. And, in the other districts, he may do so at the end of eighteen months after the other minerals have been raised; although all the lead may not then have been extracted therefrom.[6] But, in exercising these rights, he must not injure any 'mineral property'[7] without the consent of the Barmaster and two of the Grand Jury.[8]

Position of Crown as to third meer.

The Crown, in working the third 'meer,'[9] appears to stand in

[1] Wake *v.* Hall, 7 Q. B. D. 295, 297. 301, 302, 303; 8 App. Cas. 210, *per* Lord Bramwell. Lords Blackburn and Watson refused to express an opinion upon this point: see 8 App. Cas. 202, 206. It follows that the buildings and machinery are personalty as between his real and personal representatives: see 8 App. Cas. 208, 216.

[2] Wake *v.* Hall, 7 Q. B. D. 295. As to forfeiture, see *ante*, p. 513.

[3] Wake *v.* Hall, 8 App. Cas. 202, 208, 209.

[4] A. 1 of sch. 1 of each Act.

[5] See Wake *v.* Hall, 8 App. Cas. 209, 210. *per* Lord Bramwell.

[6] A. 2 of sch. 1 of each Act.

[7] See *ante*, p. 501.

[8] A. 2 of sch. 1 of each Act.

[9] *Ante*, pp. 509. 510.

a position similar to that of the ordinary miner in working the other 'meers.'[1]

e. Mutual Rights of Co-adventurers.

If any person has shares in a 'mine,' and refuses to join his partners in working it, or in contributing to the expenses, he is liable to forfeit his share to his partners; who may recover it in an action of title in the Small Barmote Court.[2] Forfeiture for non-working, or non-contribution to expenses.

f. Mutual Rights of the Miners and other Miners.

It has been already seen, that the right to mine is acquired by priority of finding; and the extent, to which the right may be exercised, has also been already considered.[3] In disputes as to the priority of title the longest continued ownership prevails. But all 'gifts' are treated as the origin of title; and workings prior to such 'gifts' do not avail. And, in all cases, the jury on a trial decide the fact of priority.[4] Where two 'veins' approach each other, but are parted with a rither exceeding three feet in thickness; and they continue asunder for one 'meer' or further in length; they are, so long as they continue asunder, treated as two distinct 'veins.' But, when they meet, the prior title takes the 'vein.'[5] Where a 'vein' crosses another 'vein,' the miner who first comes to the 'pee,' or intersection, is entitled to the 'pee.' And he may work therein as far as he can reach with a pick or hack, having a helve or shaft three-quarters of a yard long. But he must stand wholly within the cheeks of his own 'vein,' when he works.[6] A person claiming title to a 'mine' may commence an action of title in the Small Barmote Court; and recover possession.[7] Titles.

If a miner commits a trespass in the 'mine' or 'vein' of another person, the latter may recover damages in an action of trespass in the Small Barmote Court.[8] If a 'view' is being had Trespass.

[1] Wake *v.* Hall, 7 Q. B. D. 302.

[2] 14 & 15 Vict. c. 94, sch. 1, a. 20; New Cust. aa. 8, 10; 15 & 16 Vict. c. clxiii, sch. 1, a. 21.

[3] *Ante*, pp. 509, 510.

[4] A. 15 of sch. 1 of each Act.

[5] A. 14 of sch. 1 of each Act.

[6] A. 13 of sch. 1 of each Act.

[7] A. 16 of sch. 1 of each Act. See *ante*, p. 507.

[8] A. 16 of sch. 1 of each Act. See *ante*, p. 507.

at the instance of any person, not being a litigant in an action in a Small Barmote Court, for the purpose of ascertaining whether a trespass is being committed; and the majority of the Grand Jury are of opinion that a trespass is being committed, but that the fact does not yet clearly appear; the Steward may require the alleged trespasser to give security for the value of all 'ore,' which may be gotten in his workings, until the fact can be ascertained. And, in default of such security, he may authorize the Barmaster to retain all such 'ore.' And if, at any adjourned 'view,' the Grand Jury are of opinion that a trespass has been committed, the injured party may obtain the benefit of and enforce the security; or he may obtain delivery of the 'ore.' And, if either party feels himself aggrieved, he may prosecute his claim in the Small Barmote Court.[1]

Forfeiture for non-working—outgoing and incoming miner.

The liability to forfeiture for neglecting to work has been already mentioned.[2] Although a forfeiture is incurred, the right of property in the buildings and machinery used in connexion with the 'mine' continues in the miner; who may accordingly remove them, or receive compensation from the incoming miner for allowing them to remain. And the incoming miner may, on the other hand, require their removal, if he is unwilling that they should remain.[3]

g. Tithe-owners—Creditors—'Relievers.'

Tithe-owners.

There is payable by way of tithe the tenth dish of all lead ore gotten in Worselworth, Hartington, and Eyam;[4] and nine pence a load of nine dishes of all lead ore gotten in Stoney Middleton.[5] And payment may be enforced by an action for an account.[6] Tithe-ore is not due in respect of mines in Matlock

[1] 14 & 15 Vict. c. 94, sch. 1, a. 28; 15 & 16 Vict. c. clxiii, sch. 1, a. 29.

[2] *Ante*, p. 513.

[3] See Wake *v.* Hall, 7. Q. B. D. 303 (affirmed, 8 App. Cas. 195).

[4] This was so by custom before the passing of 15 & 16 Vict. c. clxiii: see Brown *v.* Vermuden, 1 Ch. Cas. 272, 282; Pindar *v.* Jackson, 1 Wood. 315; Tapping on the Act, pp. 35, 36. And the custom has been preserved by the Act: see s. 67.

[5] Burton *v.* Spencer, 2 Wood, 336.

[6] Brown *v.* Vermuden, *u. s.*; Pindar *v.* Jackson, *u. s.*; Burton *v.* Spencer, *u. s.*

or Bradbourne.[1] It is not due of common right; or otherwise than by custom.[2]

Any person claiming a debt against a miner for articles furnished to a 'mine,' or for mining purposes, or for work or labour in, upon, or in respect of any 'mineral property,'[3] may recover the amount due in an action of debt in the Small Barmote Court.[4] Creditors.

If a person 'unwaters' or gives 'relief' to any 'mine' or 'vein,' the owner of the 'relieved mine' is obliged, so long as the 'relief' is continued, to deliver to the person giving the 'relief' such portion of the 'ore' got in the 'relieved mine' under the level at which the 'relief' has been given, as the Barmaster and Grand Jury may determine. And such portion must be delivered, dressed and made merchantable, by the owner without concealment or diminution; and it must be free from all charges in getting and dressing. And the value of it may be recovered in the High Court; or, if under £50, in the County Court.[5] "Relievers."

SECT. 2.—REMAINING LOCAL RIGHTS AND CUSTOMS.

(a) *Isle of Man.*

Under the Act of Settlement of the Isle of Man the right of property in the mines and quarries, and in the minerals (not being clay and sand), in the customary estates of inheritance in the Island is vested in the Crown.[6] But the owners of Isle of Man.

[1] Chappel *v.* Ward, 1 Wood, 113; Pindar *v.* Jackson, *ib.* 315.

[2] Buxton *v.* Hutchinson, 2 Vern, 46.

[3] See *ante*, p. 501.

[4] A. 16 of sch. 1 of each Act. See *ante*, p. 507.

[5] 14 & 15 Vict. c. 94, sch. 1, a. 26; 15 & 16 Vict. c. clxiii, sch. 1, a. 27. The custom, to which this statutory sanction is given, is one long known in Derbyshire. It has, in fact, been the practice for companies of adventurers to construct and maintain large soughs or canals in that county for the purpose of draining the lead mines, upon an agreement with the mine owners to allow them a portion of the ore raised: see Arkwright *v.* Gell, 5 M. & W. 203, 228, 229; Tapping on the former Act, p. 25. The soughs are constructed through the lands of third parties, either under licenses obtained from them, or as part of the custom: see Arkwright *v.* Gell, *u.s.*

[6] See Ballacorkish, &c. Mining Co. *v.* Harrison, L. R. 5 P. C. 49; A.-G. *v.* Mylchreest, 4 App. Cas. 294.

customary estates of inheritance in the customary tenements in the Island are entitled by immemorial custom to the clay and sand therein; the custom having grown up with the tenures as one of their customary incidents, and not being incapable of having had a legal origin.[1] The Crown, and persons acting under its authority, have a customary right to go upon the customary tenements, and pierce the surface for mining purposes; subject to a customary liability to make compensation to the tenants for any damage thereby done.[2] Whether a liability can exist by custom to make compensation for an act, which does not constitute legal damage, seems doubtful.[3]

(β) *Staffordshire.*

Staffordshire.

The following custom prevails with respect to 'butty colliers'[4] in Staffordshire:—If they leave off working a coal mine without giving notice, they are not entitled to be paid for 'gate-roading,' 'air-heading,' or coals 'undergone.' But if they give notice, they are entitled to be paid for those things by the owner of the mine. And, if the mine is not worked, they are not bound to wait until the working is recommenced, and then to look for payment to the succeeding butty colliers.[5]

(γ) *Durham and Yorkshire.*

Durham and Yorkshire.

Tithe is due by custom of lead ore dug in the mines called 'Grass Groves,' in Teasdale Forest in the county of Durham;

[1] A.-G. *v.* Mylchreest, 4 App. Cas. 294.

[2] Ballacorkish, &c. Mining Co. *v.* Harrison, L. R. 5 P. C. 54; A.-G. *v.* Mylchreest, *u. s.* 309.

[3] Ballacorkish, &c. Mining Co. *v.* Harrison, *u. s.*, 64, 65. See *ante*, pp. 389, 390. As to the local right to dig for stone not being forfeited by a non-user for 21 years, see Christian *v.* Gibson, 3 Moo. P. C. 351. The Eccl. Leas. Acts do not apply to the Isle of Man: *ante*, p. 176, n. [8]: see the Bishop's Mines and Quarries (Tynwald) Act, 1868.

[4] Butty colliers are two or more working colliers who join together; and enter into an agreement with a mine owner to get coal or ironstone from the mine, at so much a yard or so much a ton, and sometimes at so much a day. They are not allowed to under-let the work or leave it; but they employ other workmen under them; and they are responsible for their wages. They usually work manually themselves; and they may bind themselves to the mine owner to do so. See Bowers *v.* Lovekin, 6 E. & B. 584; Sleeman *v.* Barrett, 2 H. & C. 934.

[5] See Bannister *v.* Bannister, 9 C. & P. 743.

and no deduction can be made for digging, winning, and getting.[1] So tithe is due by custom of lead ore when cleaned and washed in Stanhope in Weardale in the same county; and no deduction can be made for digging, winning, and getting.[2] Tithe is also due by custom of such lead ore dug in Arkilgarthdale in Yorkshire as will not go through an inch 'riddle' as it falls from the 'picks.'[3] In every case payment may be enforced by an action for an account.[4] And the impropriator may obtain liberty in such an action to go down into the mine and inspect it, and for that purpose to make use of the defendant's tackle; to secure himself against fraud.[5]

(δ) *The Colonies.*

The Colonies. The principle,[6] that a grant of lands by the Crown will not pass gold or silver mines therein, unless they are expressly granted, applies to a grant of lands in the Colonies. It has for instance been held, that a grant of lands in Victoria made before the passing of the Imperial Statute, 18 & 19 Vict. c. 55,[7] did not operate to pass gold or silver mines; they not having

[1] Tully *v.* Halsall, 1 Wood, 74.

[2] Basire *v.* Wharton, *ib.* 83.

[3] Lonsdale *v.* Bathurst, 2 *ib.* 302.

[4] See the preceding cases.

[5] See Lonsdale *v.* Bathurst, *u. s.* Peculiar customs also formerly prevailed amongst the silver and copper miners of Northumberland, Cumberland and Yorkshire; amongst the miners of Alston Moor in Cumberland (see Lead Co. *v.* Richardson, 3 Burr. 1344, 1345); amongst the lead miners of the Forest of Mendip, in Somersetshire; and in other parts of England. See Smirke's Rep. of Vice *v.* Thomas, pp. 115 *et seq.*, 121, 125, 127. In the Mendip waste are divers "grooves" and mines of lead, for which any man may dig on payment of one-tenth, by the name of lot-lead, to the lord of the manor of Wells: see Hippisley *v.* Bath & Wells, cited in Elton on Commons, 112. In Strode *v.* Little (1 Vern. 58) where a bill was brought in Chancery for an account of the profits of the Mendip mines, the defendant pleaded an Act of Parliament, which had given exclusive jurisdiction of all matters arising within the mines to particular Courts. The plea was overruled, on the ground that there was no averment that those Courts included a Court of Equity. All the customs referred to in the preceding part of this note are now obsolete. In R. *v.* Baptist Mill Co. (1 M. & S. 612) there was a demise by the lord of the manor of Rowberrow, in Somerset, of the lot or toll of one-fourth of the *lapis calaminaris* raised within the manor; but whether this had its origin in custom or agreement does not appear: see p. 617.

[6] See *ante*, pp. 40, 41.

[7] By this Act the Crown formally transferred its rights in the gold and silver in Victoria to be dealt with by the Colonial Legislature.

been expressly mentioned in the grant.[1] Mining rights in the Colonies are chiefly regulated by Acts of the local legislatures.[2]

[1] See Woolley *v.* A.-G. of Victoria, 2 App. Cas. 163. In Taylor *v.* A.-G. (8 Sim. 413) a lease by the Crown of all mines in the province of Nova Scotia was held to include mines in the island of Cape Breton.

[2] A detailed reference to these Acts, which are numerous; or to the decisions thereon, which are also numerous; would be outside the scope of this work. It may, however, be mentioned, that of the decisions thereon the following came before the Privy Council:—As to mining rights generally in Victoria, Walhalla Gold Co. *v.* Mulcahy, 40 L. J. P. C. 41: see also Col. Bk. of Australasia *v.* Willan, L. R. 5 P. C. 41; Woolley *v.* A.-G. of Victoria, *u. s.* As to the jurisdiction of the Courts of Mines there, and their relation to the Supreme Court, Walhalla Gold Co. *v.* Mulcahy, *u. s.*; Col. Bk. of Australasia *v.* Willan, *u. s.* As to the operation in New Zealand of the Gold Fields Act, 1866, Maclean *v.* Macandrew, 43 L. J. P. C. 69. As to rights to mines and Ordinary Quartz Claims in Queensland, Hollyman *v.* Noonan, 1 App. Cas. 595. As to rights to mines under State grants in Griqualand West, Webb *v.* Giddy, Giddy *v.* Webb, 3 *ib.* 908; Webb *v.* Wright, 8 *ib.* 318. And as to rights to gold mines in Nova Scotia, Mott *v.* Lockhart, *ib.* 568.

CHAPTER XXII.

STRANGERS—WRONGFUL POSSESSION—WRONGFUL ABSTRACTION—MALICIOUS INJURIES.

Sect. 1.—STRANGERS—WRONGFUL POSSESSION.

a. Existence of Remedies.

Recovery of possession.

The remedy of recovery of possession is maintainable in respect of mines, whether open or unopened,[1] if such mines and the overlying surface are possessed by the same person, and the remedy in respect of the mines is merely a part of the remedy in respect of the whole solum from the surface down to the centre.[2] And the same remedy is maintainable in respect of open[1] mines, as the distinct subject-matter of an action.[3] Whether it is maintainable for unopened[1] mines as the distinct subject-matter of an action, was until somewhat recently a question upon which there was no very distinct authority.[4] It was, however, stated in a somewhat recent case, that there may be

[1] As to open and new mines, see *ante*, pp. 22 *et seq.*

[2] Ejectment formerly lay: see Harebottle *v.* Placock, Cro. Jac. 21; Goodtitle *v.* Alker, 1 Burr. 143; Crocker *v.* Fothergill, 2 B. & Al. 660.

[3] See Comyn *v.* Kyneto, Cro. Jac. 150; Comyn *v.* Wheatley, Noy, 121; Sanders *v.* Partridge, *ib.* 132; Whittingham *v.* Andrews, 1 Salk. 255; *nom.* Andrews *v.* Whittingham, Carth. 277 (a case of coal mines in Durham, where the number of them was not mentioned); Rich *v.* Johnson, 2 Str. 1142; Port *v.* Turton, 2 Wils. 172; Sayer *v.* Pierce, 1 Ves. Sen. 232; Rose *v.* Nixon, 2 J. & W. 555. See also Doe *v.* Alderson, Smirke's Rep. of Vice *v.* Thomas; Bowser *v.* Colby, 1 Ha. 114; Dartmouth *v.* Spittle, 19 W. R. 445. See, however, the dictum in Brown *v.* Chadwick, 7 Ir. C. L. Rep. 108, a case of open quarries. See also Vice *v.* Thomas, *u.s.*; and Burt. Comp. 364. See, as to licences, *ante*, pp. 252, 253; as to tin bounds, *ante*, p. 430.

[4] Upon the point in question, see Sayer *v.* Pierce, 1 Ves. Sen. 232, 233: Wilkinson *v.* Proud, 11 M. & W. 33. The sheriff could not have given possession of unopened mines: see Cole on Eject. 91.

a corporeal right to unopened mines; of which of course possession may be recovered.[1]

Establishment of title—generally.

And proceedings are maintainable to establish a title to mines. Even before the Judicature Acts, although the legal estate might not have been outstanding, such proceedings were almost always maintainable in equity;[2] either on the ground, that mines were a species of trade, and that the taking of an account was usually required;[3] or on the ground, that the mine in question might be ruined, if it were necessary to wait for the legal remedy;[4] or on the ground, that a question as to confusion of boundaries was usually involved.[5] A title to mines and minerals may also in substance be established under the Land Registry Act.[6]

Land Reg. Act.

b. Loss of Remedies.

Limit. Acts—mines or quarries as part of entire solum.

A title to mines or quarries, as part of the entire solum from the surface down to the centre, is capable of acquisition under the Limitation Acts.[7] And a title may be acquired against a public body, such as the surveyors of highways, no less than against an individual.[8] And, if the Acts of the person who

[1] See Low Moor Co. *v.* Stanley Coal Co. 34 L. T. N. S. 186, *per* Lord Cairns. This was in the same case doubted by Mellish, L. J.; in consequence of the passage in Shep. Touch., cited *ante*, p. 202, n.[2]. Mellish, L. J. construed the passage as meaning, that in every case a right to dig mines was a mere incorporeal hereditament. But Lord Cairns construed it as merely meaning, that in every case the particular language of a deed should be examined in order to ascertain the intention.

[2] See Story *v.* Windsor, 2 Atk. 630; Falmouth *v.* Innys, Mosely, 89.

[3] Story *v.* Windsor, *u. s.* See also *ante*, p. 57, n.[2], and other cases there cited; and see Phillips *v.* Homfray, 52 L. J. Ch. 405.

[4] Falmouth *v.* Innys, *u. s.*

[5] Sayer *v.* Pierce, 1 Ves. Sen. 233: see also Vice *v.* Thomas, Smirke. As to production of documents in cases as to boundaries, see Adams *v.* Lloyd, 3 H. & N. 351; Jenkins *v.* Bushby, 35 L. J. Ch. 400; Ponsonby *v.* Hartley, W. N. 1883, 13, 44.

[6] 25 & 26 Vict. c. 53. The Act obliges an applicant thereunder to state in the description of the land to be furnished by him, whether or not he claims to be entitled to all or any of the subjacent mines and minerals. And, unless he expressly mentions mines or minerals, they are deemed not to be included. And, if he expressly mentions them, it becomes the duty of the registrar to have especial regard thereto in all subsequent inquiries to be made by him with respect to such land, and in the investigation of the title thereto, and also in the service of the statutory notices: see s. 9.

[7] 3 & 4 Will. 4, c. 27; 37 & 38 Vict. c. 57.

[8] Thew *v.* Wingate, 10 B. & S. 714, n.; Smith *v.* Stocks, *ib.* 701.

claims the title show such a possession as would have enabled him to maintain trespass against a stranger for entering and working, that fact, of itself, stamps his possession as an adverse possession; in respect of which the Limit. Acts may commence to operate.[1]

Thew v. *Wingate*[2] is an example of the acts which will suffice for this purpose. There, under an Inclosure Act, an allotment (called No. 158) of land containing a gravel pit was made to surveyors of highways for repairing purposes; and adjoining lands were allotted to another person. The surveyors obtained gravel from No. 158 down to the year 1813; but thenceforth until 1858 they never entered or exercised any right thereon. In 1813 the adjoining allottee built a cottage and barn, and other buildings, on part of No. 158, and inclosed part of it with a fence. About the same time he cut off a corner of it; and he thereafter used such corner with part of his own allotments as one entire arable field. In 1814 or 1815 he cleared out the pit, and converted it into a pond. It was held, that the acts of the adjoining allottee, being acts of ownership in parts of the subsoil of a single and undivided piece of land, were evidence that he had taken possession of the whole; that such possession would have enabled him to maintain trespass against a stranger for meddling with the subsoil; and, accordingly, that he had acquired a title against the surveyors. So in *Smith* v. *Stocks*.[3] There, under an Inclosure Act, a gravel pit was allotted to surveyors of highways for repairing purposes. The pit was entirely surrounded by the plaintiff's land. From 1837 to 1863 the surveyors ceased to take gravel from the pit, and took no steps to assert their right thereto. In 1837 a tenant of the plaintiff's predecessor filled up part of the pit; and he cultivated the surface as arable land until 1863. In 1839 another tenant ploughed up the remaining portion; and he cultivated it as arable land until 1863. It was held, that the title of the surveyors was barred by the Statute of Limitations. And in the same case the fact, that the first-mentioned tenant was in 1844 elected a surveyor, and held office for a year, was

Thew v. Wingate.

Smith v. Stocks.

[1] Thew *v.* Wingate, 10 B. & S. 714, n.: see p. 721, n., *per* Blackburn, J. As to trespass, see *infra*, Sect. 2, *b*.

[2] 10 B. & S. 714, n.

[3] *Ib.* 701.

held insufficient to interrupt the running of the Statute; the character of his possession as tenant not having been altered during his year of office.

Not necessary to inclose surface.

However, it would appear, that, to acquire a title to mines or quarries, as part of the entire solum from the surface down to the centre, it is not necessary that the surface should be inclosed or fenced. It has been laid down, that in such a case adverse possession may be acquired by an user, such as a farmer might exercise over his farm.[1]

Limit. Acts—mines or quarries as separate subject-matter.

A title to mines or quarries, whether open or unopened,[2] as a separate subject-matter, is also capable of acquisition under the Limit. Acts, if the person claiming them has already the exclusive right to the surface.[3] And if his acts show such a possession of them as, if he were not already entitled to the surface, would have enabled him to acquire a title to them as part of the entire solum from the surface down to the centre, they will enable him to acquire a title to them as a separate subject-matter.[4] And a title to mines or quarries, whether open or unopened,[2] as a separate subject-matter, is equally capable of acquisition, where the person claiming them has not already the exclusive right to the surface.[5] For the same principle must apply where mines or quarries are approached laterally as that, which applies where they are approached vertically. And in the case of unopened [2] mines forming a separate subject-matter, it has been held, that where a tenancy at will had been established by an entry into possession under an unenrolled bargain and sale, the Statute of Limitations began to run from the first year of such tenancy; so as, after the proper lapse of time, to perfect the title of the bargainee.[6] And an unmistakeable adverse possession would probably be shown, if the mine or quarry in

[1] See Seddon *v.* Smith, 36 L. T. 168, 169. Cf. the law in the case of licences, *ante*, p. 253.

[2] As to open and new mines or quarries, see *ante*, pp. 22 *et seq.*

[3] See Thew *v.* Wingate, 10 B. & S. 714 n., 721 n, *per* Blackburn, J.

[4] *Ib.*: see *ante*, p. 525 As to Scotch law, see Fleeming *v.* Howden, 6 Sess. Cas. (3rd ser.) 783.

[5] See Dartmouth *v.* Spittle, 19 W. R. 445.

[6] Low Moor Co. *v.* Stanley Coal Co. 34 L. T. 186, *per* Lords Cairns and Coleridge. Mellish, L. J. doubted whether the Statute could apply; on the ground, that ejectment would not have lain: see *ante*, p. 524, n. [1]. Cf. Story *v.* Windsor, 2 Atk. 630, 632.

question were surrounded on all sides with galleries, and a certain defined area so opened out.[1]

Possession of part of a mine —possession of overlying seam.

However, as has been already seen,[2] where there is an entry into possession of part of a mine, the possession of the whole will, or will not, in general, be presumed, according as the possession of the part is rightful, or under a colour of right, or is wrongful. And from this it follows, that where the entry into possession is wrongful, a title can, in general, be only acquired in respect of the part of which actual physical possession has been taken.[3] Where a man enters on and takes possession of one seam of coal, and by lapse of time acquires a title to it, the law will not presume that his possession extends to all the other seams of coal lying under that particular one.[4]

Non-user.

Mere non-user by a mine owner, no matter for how long a time, will not give the surface owner a title to mines or quarries by prescription. In the case of other kinds of property the inference of an abandonment of a right by non-user may fairly be made. But not in the case of mines. For mines are frequently purchased or excepted for the express purpose of keeping them unwrought until other mines shall be exhausted. These propositions were laid down long before the first Real Prop. Limit. Act[5] came into operation.[6] Indeed in one case it was laid down, that there could be no presumption of a grant of mines, in the face of an express exception on a sale many years previously; although the mine owner had permitted an expenditure by the surface owner in respect of the mines without making any claim thereto.[7] And the Limit. Acts have not made any change in the law. In *McDonnell* v. *McKinty*,[8] a case decided since the first of them came into operation, it was said:— "Discontinuance means an abandonment of possession by one person followed by the actual possession of another person."

[1] See Ashton *v.* Stock, 6 Ch. D. 726. See also Seaman *v.* Vawdrey, 16 Ves. 392; Mawson *v.* Fletcher, 10 Eq. 214, 219; 6 Ch. 94.

[2] *Ante*, p. 41.

[3] McDonnell *v.* McKinty, 10 Ir. L. R. 527; Dartmouth *v.* Spittle, 19 W. R. 445. See also Ashton *v.* Stock, *u. s.*

[4] See Low Moor Co. *v.* Stanley Coal Co. 34 L. T. N. S. 186, 189.

[5] 3 & 4 Will. 4. c. 27.

[6] See Seaman *v.* Vawdrey, 16 Ves. 392: see also Crang *v.* Adams, 5 B. P. C. 588; Hodgkinson *v.* Fletcher, 3 Doug. 31; Adair *v.* Shaftoe, cited, 19 Ves. 156.

[7] Adair *v.* Shaftoe, *u. s.*

[8] 10 Ir. L. R. 514.

. . . . "Only by user of them, or by some unequivocal act of possession," can a person who has excepted mines from a sale be dispossessed by lapse of time.[1] . . . "Mines from their nature are exempted from the presumption, which non-user justifies in other kinds of property; for mines are frequently purchased or excepted with a view to their being opened and worked at a future time."[2] The Limit. Acts do not apply to the mere want of actual possession by the owner; but to cases where the owner has been out of possession, and some other person has been in possession.[3] *Thew* v. *Wingate*[4] is an example of the acts of possession which will be regarded as "unequivocal."[5]

Purchase and exception probably on similar footing as to non-user.

The observations in *McDonnell* v. *McKinty* are not, it will be observed, confined to the case of a mine being excepted from a sale. They are also applied to the case of a mine being purchased.[6] In other words, they are applied not merely to non-user by a person who has once been in possession; but to non-possession by a person, who, with the right to take, has never actually taken, possession. And it is submitted that this is the law. And, if so, it is not necessary, that a mineral lessee, whom the Statute of Uses may not have clothed with possession, should make an actual entry within the period prescribed by the Limit. Acts, in order to preserve his rights against his lessor; the latter not having been himself in adverse possession. Indeed, if the law were otherwise, the lessor of a mine, whose lessee could not avail himself of the Statute of Uses, and was disentitled to work,[7] might, it would seem, without any default by the lessee, insist that upon the expiration of twelve years from the date of the lease, the right of possession had become, *ipso facto*, revested.[8] In

[1] P. 526.

[2] P. 527. Cf. Jamieson *v.* Harvey, W. N. 1876, p. 277.

[3] Smith *v.* Lloyd, 9 Exch. 562, 572; Thew *v.* Wingate, 10 B. & S. 719 n., 720 n.; Smith *v.* Stocks, *ib.* 701; Dartmouth *v.* Spittle, 19 W. R. 445. See also Low Moor Co. *v.* Stanley Coal Co. 33 L. T. N. S. 436 (affd. 34 *ib.* 186); and cf. Tottenham *v.* Byrne, 12 Ir. C. L. Rep. 383, 385.

[4] 10 B. & S. 714 n.

[5] See the facts stated, *ante*, p. 525.

[6] See *supra*. See also Seaman *v.* Vawdrey, 16 Ves. 392.

[7] See *ante*, p. 227.

[8] See and consider Low Moor Co. *v.* Stanley Coal Co., 33 L. T. 436; 34 *ib.* 186.

Keyse v. *Powell*,[1] however, it seems to have been assumed, that a mineral lessee, who had never actually entered, and who could not avail himself of the Statute of Uses, had for all purposes, although without any adverse possession in another, a mere *interesse termini;* and was, accordingly, liable to be barred of his right after the lapse of the statutory period. The principles, which apply where a mine is purchased or excepted, equally apply where it is severed from the surface under an Act of Parliament.[2] Statutory severance and non-user.

A wrongdoer cannot, by merely having worked for more than twelve years from his own mine into a mine belonging to his neighbour, and without more, claim a title to his neighbour's mine under the Limit. Acts.[3] Trespass.

A claim to a given substratum of coal lying under a close, not being a claim to a right of profit *à prendre*, but a claim to a part of the soil itself, cannot be sustained under the Prescription Act.[4] Prescript. Act.

All claims of the Duke of Cornwall to mines or minerals in Cornwall are barred, where the land has been held and enjoyed adversely without interruption or disturbance for sixty years; and the mines and minerals have been substantially worked at any time during that period by the person in enjoyment; and have not at any time during that period been worked, or the tolls, dues, royalties, and other profits enjoyed, by the Duke or persons claiming under him.[5] And all such claims are equally barred, where the land has been held and enjoyed adversely without interruption or disturbance for 100 years; and the mines and minerals have not at any time during that period been worked, or the profits enjoyed, by the Duke or persons claiming under him.[6] But time does not begin to run as to reversions until they fall into possession;[7] nor as to hereditaments granted for limited estates until such estates fail.[8] And the bar does not extend to any mines or minerals determined Duchy of Cornwall minerals.

[1] 2 E. & B. 132.

[2] See Thew v. Wingate, 10 B. & S. 714, n., the facts of which are partly stated, *ante*, p. 525.

[3] Dartmouth v. Spittle, 19 W. R. 444; Ashton v. Stock, 6 Ch. D. 719, 726.

[4] Wilkinson v. Proud, 11 M. & W. 33. See s. 1 of the Act cited, *ante*, p. 97, n.[5].

[5] 7 & 8 Vict. c. 105, s. 73.

[6] S. 74.

[7] S. 76.

[8] S. 77.

to belong to the Duke by the award under the Act 7 & 8 Vict. c. 105.[1]

Sect. 2.—Strangers—Wrongful Abstraction—Civil Remedies.

a. Existence of Remedies—Person Liable.

Generally.

If a stranger enters on another man's land, and works or abstracts his minerals, whether by breaking bounds, or otherwise, the injured party is, *primâ facie*, entitled to a remedy.[2] And to entitle a person to a remedy, it is not necessary that he should be in *esse* at the date of the wrongdoing. A contingent remainderman, upon coming into *esse*, may, for example, have a remedy in respect of previous wrongful workings.[3] However, where it is *ultra vires* of a company, such as a railway company, or a harbour company,[4] to work mines, no remedy can, it seems, be had against them by a person, whose minerals they may have wrongfully abstracted.[5]

Person liable.

The actual wrongdoer is not, of necessity, alone liable. A person who shares the profits of the wrongdoing; as, for instance, an employer,[6] or a partner;[7] may be also liable. And where third parties work mortgaged minerals under an authority given by the mortgagee, and the mortgagee has no power to give the authority, the third parties are liable to the mortgagor.[8] And persons may also be liable, who take part in the wrongdoing; although they do not share the profits.[9] And, of course, persons, under whose directions minerals are wrongfully removed, may be liable; although the act of getting and winning is done by

[1] See s. 80. See *ante*, p. 39.

[2] An issue will, if necessary, be directed to ascertain the facts as to the working: see A.-G. *v.* Chambers, A.-G. *v.* Rees, 4 De G. & J. 55, 73, where an issue was directed to ascertain, whether there had been a working below the present or former line of high water at ordinary tides.

[3] Garth *v.* Cotton, 1 L. C. 780.

[4] *Ante*, p. 86.

[5] Eccl. Comms. *v.* N. E. R. Co., 4 Ch D. 845, 855, 856.

[6] See Thomas *v.* Atherton, 10 Ch. D. 198; Joicey *v.* Dickinson, 45 L. T. N. S. 643.

[7] See Thomas *v.* Atherton, *u. s.*, 197.

[8] Hood *v.* Easton, 2 Giff. 692, 697, 698; 2 Jur. N. S. 917.

[9] Powell *v.* Aiken (4 K. & J. 343, 358) only decided, that the remedy was not available in Equity before the Jud. Acts.

another.[1] Where two or more persons are together guilty of the wrongdoing, each is answerable for the whole of the damage.[2]

Liability of mortgagee for acts of mortgagor.

A mortgagee cannot be made accountable for the acts of his mortgagor in possession, who is guilty of wrongfully abstracting or working the minerals of third parties.[3] And it makes no difference that the proceeds of the abstracted minerals are applied by the mortgagee in reduction of his debt; if he has no notice of the wrongful acts of the mortgagor.[4] It has, however, been intimated that, if, after a mortgagor has wrongfully abstracted or worked minerals belonging to third parties, the mortgagee goes into possession; and, although without knowing that he is acting wrongfully, himself continues the abstraction; the onus may possibly lie upon him to show how much he himself abstracted, and how much his mortgagor abstracted.[5] And where a mortgagor abstracts minerals from the land of another; and sells them, and pays over the proceeds to the mortgagee; the mortgagee, if he has known of the abstraction, may be made liable.[6]

b. Damages—Account.

Where injured party has right of property.

If the injured party has a right of property in the abstracted minerals, he may, in general, maintain an action to recover them.[7] Or he may maintain trespass.[8] Or, if the minerals have been sold, he may recover damages.[9] Or he may have an

[1] See Powell *v.* Aiken, 4 K. & J. 343: see the form of the order at p. 359.

[2] See Addison on Torts, 84, 85; and cases there cited. See the forms of the decrees in Hood *v.* Easton, 2 Giff. 701; Phillips *v.* Homfray, 6 Ch. 774, 775, 776.

[3] Powell *v.* Aiken, *u. s.* Cf. Brain *v.* Thomas, 50 L. J. Q. B. 662.

[4] Powell *v.* Aiken, *u. s.*

[5] Powell *v.* Aiken, *u. s.*, 343, 353, 354. See the form of the order, 359, 360.

[6] Powell *v.* Aiken, *u. s.*, 349, 350. Cf. Elias *v.* Griffith, 8 Ch. D. 521, 527, 528, 534.

[7] Attersoll *v.* Stevens, 1 Taunt. 183, 199, 201. Trover formerly lay: see Wood *v.* Morewood, 3 Q. B. 440, n.; Eardley *v.* Granville, 3 Ch. D. 826, 833.

[8] See Martin *v.* Porter, 5 M. & W. 351; Morgan *v.* Powell, 3 Q. B. 278; Wild *v.* Holt, 9 M. & W. 672; Clegg *v.* Dearden, 12 Q. B. 576; Brain *v.* Harris, 10 Exch. 908; Dartmouth *v.* Spittle, 19 W. R. 444; Loosemore *v.* Tiverton, &c., R. Co., 22 Ch. D. 42, 43, 44.

[9] See Seddon *v.* Smith, 36 L. T. N. S. 168. An action for money had

account.[1] Even before the Jud. Acts an account was usually[2] maintainable in equity; mining operations having always been regarded as a species of trade.[3] And even if his right of property rests on mere legal presumption, he is entitled to similar remedies. And if he shows a right or colour of right applying to a whole mine or vein, and acts of ownership exercised over the minerals in parts, the law will, as against a stranger, presume his right of property over the minerals in the other parts.[4] And he will sufficiently show a right applying to a whole mine or vein, if he shows that he has an agreement for a lease thereof, and that he could compel the lessor to perform it. For in such a case he will be treated as constructively in possession.[5] And if he shows acts of ownership in parts of the subsoil of a single and undivided piece of land, they may be evidence that he has taken possession of the whole; and the law may, as against a stranger who meddles with the subsoil, presume his right of property over the whole.[6] Indeed, if such a presumption can be made, that fact will, of itself, as has been already seen,[7] stamp his possession as an adverse possession; and enable it, as against the actual owner, to ripen into property by lapse of time accordingly.

Or is presumed to have it.

and received formerly lay: see Powell *v.* Rees, 7 A. & E. 426.

[1] See Strode *v.* Little, 1 Vern, 58; Thomas *v.* Oakley, 18 Ves. 184; Thomas *v.* Jones, 1 Y. & C. C. C. 510, 526; Eads *v.* Williams, 4 De G. M. & G. 674, 693; Dean *v.* Thwaite, 21 Beav. 622; Hood *v.* Easton, 2 Giff. 692, 697, 698; 2 Jur. N. S. 917; Powell *v.* Aiken, 4 K. & J. 343; Hunt *v.* Peake, Joh. 705; Ernest *v.* Vivian, 33 L. J. Ch. 517; Ackroyd *v.* Briggs, 13 L. T. N. S. 521; Hilton *v.* Woods, 4 Eq. 432; Plant *v.* Stott, 21 L. T. N. S. 106; Llynvi Co. *v.* Brogden, 11 Eq. 188; Jegon *v.* Vivian, 6 Ch. 742; Phillips *v.* Homfray, *ib.* 770; Eccl. Commis. *v.* N. E. R. Co., 4 Ch. D. 845; Ashton *v.* Stock, 6 *ib.* 719; Trotter *v.* Maclean, 13 *ib.* 574.

[2] It would have been refused, if the party seeking it did not show some privity with the other party, or some impediment to obtaining a legal remedy (Vice *v.* Thomas, Smirke's Rep.); or did not show possession (Sayer *r.* Pierce, 1 Ves. Sen. 232; Parrott *v.* Palmer, 3 M. & K. 645).

[3] See Story *v.* Windsor, 2 Atk. 630; Jefferys *v.* Smith, 1 J. & W. 302; Rose *r.* Nixon, 2 *ib.* 555; Williams *v.* Attenborough, T. & R. 73. See also *ante*, p. 57, n.[2] and other cases there cited; and see Phillips *v.* Homfray, 52 L. J. Ch. 405.

[4] See Taylor *v.* Parry, 1 Scott, N. R. 576; Wild *v.* Holt, 9 M. & W. 672. Cf. Davis *v.* Shepherd, 1 Ch. 410, 414, 415, 416, 417, 420; Low Moor Co. *v.* Stanley Co., 33 L. T. 436, 34 *ib.* 186.

[5] Davis *v.* Shepherd, *u. s.*; *ante*, p. 41.

[6] Thew *v.* Wingate, 10 B. & S. 721, n. *per* Blackburn, J.

[7] *Ante*, p. 525.

If the injured party has the right of possession; as, if he is a tenant for life or years impeachable of waste,[1] or a tenant from year to year,[2] or a tenant at will,[3] or a copyholder;[4] he may, in general, maintain trespass. Or he may have an account.[5] Where injured party has right of possession.

And the benefit of a remedy may not be confined to the immediate owner or possessor. The reversioner on a lease has been held entitled to maintain case against a trespasser for digging coal in the lessees' land.[6] A person, who would otherwise be entitled to maintain trespass, is not the less entitled, because the wrongdoers are a railway company, who have entered upon minerals which have been reserved to him. The company cannot in such a case say, that he has only been "injuriously affected" under sect. 6 of the Rail. Cl. Cons. Act, 1845;[7] and is only therefore entitled to the compensation recoverable thereunder.[8] Injury to reversioner—trespass by railway company.

c. Measure of Damages.

(a) Generally.

Damages for the wrongful working or abstraction of minerals may be assessed according to the value of the minerals at the pit's mouth; without making any allowance for the expense of getting and severing, or of bringing to bank. Or they may be assessed according to the value when got and severed; allowing for the expense of bringing to bank, but not for the expense of Different measures of damages.

[1] Keyse *v.* Powell, 2 E. & B. 132; Hollyman *v.* Noonan, 1 App. Cas. 595. See also Cox *v.* Glue, 5 C. B. 549. See *ante*, p. 32.

[2] Keyse *v.* Powell, *u.s.* See *ante*, p. 32.

[3] Low Moor Co. *v.* Stanley Coal Co., 34 L. T. N. S. 186. See *ante*, p. 32.

[4] Lewis *v.* Branthwaite, 2 B. & Ad. 437; Bowser *v.* Maclean, 2 De G. F. & J. 415; Eardley *v.* Granville, 3 Ch. D. 826, 833. See *ante*, p. 34.

[5] For the form of an order directing an account, see Bell *v.* Joell, Set. 203; Baynton *v.* Leonard, *ib.* And for the form of an inquiry for ascertaining the value of minerals abstracted, see *ib.*: Hunt *v.* Peake, Joh. 713; Jegon *v.* Vivian, 6 Ch. 742, 762. The account may be taken by a referee: see Dean *v.* Thwaite, 21 Beav. 623, 624; Craven *v.* Kaye, Set. 205; Eccl. Comms. *v.* N. E. R. Co., 4 Ch. D. 845, 867, 868; Joicey *v.* Dickinson, 45 L. T. N. S. 643.

[6] Raine *v.* Alderson, 6 Scott, 691. Cf. Harker *v.* Birkbeck, 3 Burr. 1560 n.

[7] See *ante*, p. 344 n. [1].

[8] Loosemore *v.* Tiverton, &c., R. Co., 22 Ch. D. 25, 43. As to trespasses in the Forest of Dean, see *ante*, p. 199.

getting and severing. Or they may be assessed with an allowance for the expense both of getting and severing, and also of bringing to bank.

Former remedies at law.

Formerly, where the remedy was sought at law in trover, the plaintiff, if, before action brought, he had demanded delivery of the severed chattel, and the demand had not been complied with, was apparently entitled to recover the value of the chattel; without allowing for the expense either of getting and severing, or of bringing to bank.[1] Where, however, the remedy was sought at law in trespass, and no previous demand had been made, the plaintiff was entitled to recover the value; without allowing for the expense of getting and severing; but allowing for the expense of bringing to bank.[2] Furthermore, it was laid down in one of the cases at law,[3] that, if the defendant had not been guilty of fraud or negligence, but had honestly believed that he was acting within his rights, he ought to be allowed the expense of getting and severing, as well as of bringing to bank.[4]

Remedies in equity—*bonâ fides.*

However, in equity the right of the defendant to an allowance has usually been held to depend upon whether he has acted *bonâ* or *malâ fide*. If he has acted, as it has been described, "fairly and honestly;" or "inadvertently;" or under a "mere mistake;" or under a "*bonâ fide* belief of title;"[5] or even in the *bonâ fide* expectation, that he was about to obtain a title, and the injured party has (or must be treated as having)

[1] Martin *v.* Porter, 5 M. & W. 352, *per* Parke, B.; Wood *v.* Morewood, 3 Q. B. 440 n., 441 n., *per* Parke, B.; Morgan *v.* Powell, 3 Q. B. 281, *per* Coleridge, J.; Livingstone *v.* Rawyards Coal Co., 5 App. Cas. 39, 40, *per* Lord Blackburn.

[2] Martin *v.* Porter, 5 M. & W. 352, 354; Morgan *v.* Powell, 3 Q. B. 278; Wild *v.* Holt, 9 M. & W. 672; Hunter *v.* Gibbons, 1 H. & N. 466; Jegon *v.* Vivian, 6 Ch. 760.

[3] Wood *v.* Morewood, 3 Q. B. 441 n. Wood *v.* Morewood was only a Nisi Prius decision; but it received the express sanction of Lord Blackburn in Livingstone *v.* Rawyards Coal Co., 5 App. Cas. 40.

[4] See also Wild *v.* Holt, 9 M. & W. 673; Hood *v.* Easton, 2 Giff. 699, 700; Jegon *v.* Vivian, 6 Ch. 761. Cf. Jones *v.* Gooday, 8 M. & W. 146.

[5] Hilton *v.* Woods, 4 Eq. 432, 440; Jegon *v.* Vivian, 6 Ch. 742, 760, 761, 762; United Merthyr Co., 15 Eq. 46; Job *v.* Potton, 20 Eq. 84, 97; Ashton *v.* Stock, 6 Ch. D. 719, 727; Brown *v.* Dibbs, 25 W. R. 776; Elias *v.* Griffith, 8 Ch. D. 529; Trotter *v.* Maclean, 13 Ch. D. 574, 586; Livingstone *v.* Rawyards Co., 5 App. Cas. 25, 34, 40; Joicey *v.* Dickinson, 45 L. T. N. S. 643; Tucker *v.* Linger, 21 Ch. D. 29 (affirmed 8 App. Cas. 508). See also Hunter *v.* Gibbons, 1 H. & N. 466; Powell *v.* Aiken, 4 K. & J. 359.

known of the abstraction;[1] he has usually been allowed the expense both of getting and severing, and also of bringing to bank.[2] Indeed, in a case, where minerals A., consisting of an acre and a half only in extent, were surrounded on all sides by minerals B.; and it was believed by both the owner of A. and the lessees of B., that minerals A. were included in the lease of B.; and it was impossible for the owner of minerals A. to have worked them to a profit himself, or to have disposed of them except to the lessees of B.; and the lessees of B. worked out and disposed of A.; it was held, that the remedy of the owner of A. was confined to the value to him of minerals A. at the time they were taken; and that, in the circumstances, the best estimate of that value was a sum calculated at the rate of the royalty paid by the lessees of B. under their lease.[3] And, in another case, an honest wrongdoer was, on similar principles, in addition to the above-mentioned allowances, held entitled to an allowance for carrying to market.[4]

No colour of right—negligence, &c.

If, on the other hand, the defendant has acted, as it has been described, "without any colour of title;" or "in a manner wholly unauthorized and unlawful;" or if his conduct has been "negligent" or "wilful;" he has usually been held not entitled to an allowance for getting and severing.[5] Thus, where the mortgagor of a mine worked into his neighbour's mine; and the mortgagees entered into possession, and continued the workings, but without knowing that they were wrongful; an inquiry was directed to ascertain the value at the pit's mouth of all the coal abstracted by the mortgagees; allowing them the expense of bringing to bank, but not of getting and

[1] Trotter *v.* Maclean, 13 Ch. D. 574. 586. In this case one of four trustees had actual knowledge; and, it being his duty to impart it, knowledge was imputed to the others: see pp. 585, 588.

[2] For the form of the order, see Powell *v.* Aiken, 4 K. & J. 359, 360; Job *v.* Potton, 20 Eq. 99; Hilton *v.* Woods, Set. 206; Jegon *v.* Vivian, 6 Ch. 762; Set. 205, 206; Ashton *v.* Stock, Set. 1652.

[3] Livingstone *v.* Rawyards Co., 5 App. Cas. 25.

[4] Brown *v.* Dibbs, 25 W. R. 776.

[5] Powell *v.* Aiken, 4 K. & J. 343; Llynvi Co. *v.* Brogden, 11 Eq. 188; Phillips *v.* Homfray, Fothergill *v.* Phillips, 6 Ch. 770, 776, 780; Job *v.* Potton, 20 Eq. 97; Eccl. Comms. *v.* N. E. R. Co., 4 Ch. D. 845, 868; Thomas *v.* Atherton, 10 *ib.* 200, 202; Trotter *v.* Maclean, 13 *ib.* 574, 587; Joicey *v.* Dickinson, 45 L. T. N. S. 643; Tucker *v.* Linger, 21 Ch. D. 29 (affirmed 8 App. Cas. 508). For the form of the order, see Llynvi Co. *v.* Brogden, 11 Eq. 191; Set. 206; Phillips *v.* Homfray, 6 Ch. 775, 776.

severing.[1] So, where a mine was vested in trustees without power to lease it; and the owner of an adjoining mine commenced to work into the trustees' mine, in the *bonâ fide* belief that he was about to obtain a lease from them; and notice was subsequently given to the adjoining owner, that no lease could be granted; it was held, that, in respect of workings subsequent to the date of the notice, the adjoining owner could only be allowed the expense of bringing to bank.[2]

Intentional fraud.

If the wrongdoer is guilty of intentional fraud, and his conduct amounts to larceny, his position is not in equity more disadvantageous. No doubt there are cases apparently deciding, that where the wrongdoer is guilty of larceny, he is disentitled not merely to an allowance for getting and severing, but to an allowance for bringing to bank.[3] And there are *dicta* in other cases, which are actually or apparently to the same effect.[4] But any decisions or *dicta* to that effect must now be treated as overruled.[5] Where, however, the minerals in question formed part of a property in mortgage; and the mortgagee had no right to work them, and was bound to account for their value without obtaining any allowances;[6] a stranger professing to work under his authority was held to stand in the same position.[7] But the decision is of at least doubtful correctness.[8]

Stranger working by authority of mortgagee.

Result of the law.

Having regard to the provisions of the Jud. Act, 1873, that, in all cases of conflict between the rules of equity and of law, the rules of equity shall prevail,[9] the following propositions may be laid down respecting the subject now in question:—

[1] See Powell *v.* Aiken, 4 K. & J. 343. See the observations on this case in Llynvi Co. *v.* Brogden, 11 Eq. 191.

[2] Trotter *v.* Maclean, 13 Ch. D. 574.

[3] See Plant *v.* Stott, 21 L. T. N. S. 106; where an account was directed of the 'full market value' of the severed minerals. From the short form of the decree in Bell *v.* Joell, given in Set. (p. 203), all allowances would seem to have been there also excluded.

[4] See Hilton *v.* Woods, 4 Eq. 440, *per* Malins, V.-C.; Jegon *v.* Vivian, 6 Ch. 761, 762, *per* Lord Hatherley; United Merthyr Co., 15 Eq. 47 n. Job *v.* Potton, 20 Eq. 91, 97, *per* Bacon, V.-C.; Livingstone *v.* Rawyards Coal Co., 5 App. Cas. 34, 39, *per* Lords Hatherley and Blackburn.

[5] See Trotter *v.* Maclean, 13 Ch. D. 586, *per* Fry, J.; Joicey *v.* Dickinson, 45 L. T. N. S. 643, *per* Baggallay, Lush, and Lindley, L.JJ.

[6] See, as to this highly punitive remedy in the case of a mortgagee, *ante*, p. 84.

[7] Hood *v.* Easton, 2 Giff. 692, 699, 700, 701.

[8] See S. C. on appeal, 2 Jur. N. S. 917, 918.

[9] 36 & 37 Vict. c. 66, s. 25, sub-s. 11.

(1) Where the wrongdoer acts under a *bonâ fide* belief, that he is entitled to remove the minerals in question, damages will usually be assessed against him on the principle of allowing him the expense both of getting and severing, and also of bringing to bank.

(2) Where the wrongdoer is guilty of negligence or inadvertence, or otherwise acts without any colour of right, he will usually be allowed the expense of bringing to bank, but not of getting or severing.

(3) The same principle will apply, although the wrongdoer is guilty of intentional fraud, and his conduct amounts to larceny.

(8) *Consequential Damage—Unsaleability of Minerals—Trade Allowances.*

Consequential damage.

Where the wrongdoer might otherwise, in accounting, be entitled to allowances, he may possibly disentitle himself, if he has worked in such a manner as to seriously injure the rest of the plaintiff's mine.[1] And it is quite clear, that the wrongdoer may now be made directly liable for all consequential injury which may be caused; whether by reason of surface damage;[2] or by reason of the rest of the plaintiff's minerals being rendered unworkable, or useless;[3] or otherwise.[4] So, if the result of the wrongdoer's conduct is to remove a barrier, and thereby render the plaintiff's mine liable to be invaded by water, the plaintiff may be entitled to additional damages for this indirect injury.[5] However, if, as the result of the wrongdoer's conduct, a

[1] Powell *v.* Aiken, 4 K. & J. 343, *per* Wood, V.-C.

[2] See Hunt *v.* Peake, Joh. 705; Livingstone *v.* Rawyards Coal Co., 5 App. Cas. 25, 31.

[3] See Jegon *v.* Vivian, 6 Ch. 742, 759, 762.

[4] See Nelson *v.* Bridges, 2 Beav. 244; Plant *v.* Stott, 21 L. T. N. S. 106. In Jegon *v.* Vivian, *u. s.*, a general inquiry was directed as to the damages, which the plaintiff had sustained by reason of the defendant's workings. For the form, see Set. 205. See also Bell *v.* Joell, Set. 203; Llynvi Co. *v.* Brogden, 11 Eq. 192; Set. 206; Phillips *v.* Homfray, 6 Ch. 776, 781; Williams *v.* Raggett, 25 W. R. 874; Set. 1652. The law was laid down the other way in Powell *v.* Aiken, *u. s.* (see p. 351): but this was before Lord Cairns' Act and the Judicature Acts.

[5] Plant *v.* Stott, *u. s.*; Eccl. Comms. *v.* N. E. R. Co., 4 Ch. D. 845, 867, 868. Cf. Jegon *v.* Vivian, 6 Ch. 759: and see the first inquiry in the minutes, p. 762.

barrier is removed, and compensation is recovered for the act of trespass, the wrongdoer's liability in respect of it is at an end. He cannot be made liable in respect of a subsequent influx of water through the aperture. For he incurs no obligations in consequence of his mere omission to close it up.[1]

Unsaleability of minerals.

The mere circumstance, that the injured party could not have sold the severed minerals, but could only have consumed them upon the premises beneath which they lay, does not affect the measure of damages.[2] But it may be otherwise, if he could not have got them, or could only have got them at a ruinous expense.[3]

Trade allowances.

Under an order allowing "actual costs and expenses;" or "disbursements;"[4] or, it seems, "just allowances;"[5] profit or trade allowances will not be included.

d. Mode of Dealing with Proceeds.

Tenant for life or years.

Where during the possession of a tenant for life or years, who is entitled to work minerals,[6] they are severed by a stranger, the damages recoverable against him[7] will belong absolutely to such tenant for life or years.[8] His right thereto cannot be affected by the circumstances, that he might not himself have worked the minerals during the period of his interest; and that, if he had not done so, they would have devolved as part of the inheritance upon the remainderman or reversioner.[9] Where during the possession of a tenant for life or years, who is not entitled to work minerals,[10] they are severed by a stranger, the damages recoverable against him[7] will be dealt with as follows:—If, at the time of the severance, there is not any person in *esse* entitled to an estate of inheritance in reversion or remainder in the mines or quarries, the proceeds, or the amount to be accounted for, will be invested and dealt

[1] Clegg *v.* Dearden, 12 Q. B. 576.

[2] Ashton *v.* Stock, 6 Ch. D. 719, 726.

[3] See Livingstone *v.* Rawyards Coal Co., 5 App. Cas, 25; *ante*, p. 535.

[4] United Merthyr Co., 15 Eq. 46.

[5] See p. 49.

[6] See *ante*, pp. 46, 55.

[7] *Ante*, pp. 533 *et seq.*

[8] See and consider the eighth resolution in Bowles' Case. L. C. Conv. 37.

[9] See Attersoll *v.* Stevens, 1 Taunt. 183.

[10] See *ante*, pp. 48, 51.

with as part of the *corpus* of the estate.[1] And it seems, that during the possession of the tenant for life or years, the income will not be accumulated, but will be paid to him; he not having done anything to disentitle himself to receive it.[2] With this exception, the principles, applicable to determine the mode of dealing with the amount recovered in respect of wrongful workings by a tenant for life or years,[3] seem equally to apply where the severance is the act of a stranger.[4]

Copyholder.

It has been said, that, where copyhold minerals are severed by a stranger, the damages recoverable against him should be divided in equal shares between the lord and the copyholder.[5]

e. Injunction—Receiver and Manager.

Injunction.

The injured party may also, in general, have an injunction to restrain the future working or abstraction. Prior to the Judicature Act, 1873, very fine distinctions were, in cases of trespass, drawn between the right to restrain a person who was in possession, and a person who was not in possession; and between the right to restrain a person not in possession who was a mere trespasser, and a person not in possession who acted under a colour of right.[6] But there was usually[7] no difficulty

[1] See and consider Bewick *v.* Whitfield, 3 P. Wms. 267; Lushington *v.* Boldero, 15 Beav. 1; Honywood *v.* Honywood, 18 Eq. 306.

[2] See and consider Lushington *v.* Boldero, *u. s.*, 7; Bagot *v.* Bagot, 32 Beav. 509, 519. The only reason in this and similar cases for refusing to allow the tenant for life or years to receive the income is that he is a wrongdoer. See also Lee *v.* Alston, 1 B. C. C. 193; 3 *ib.* 37; Bell *v.* Wilson, 1 Ch. 309.

[3] *Ante*, pp. 58, 59, 60.

[4] Consider Gresley *v.* Mousley, 3 De G. F. & J. 433, 445, 446; and see Garth *v.* Cotton, 1 L. C. 781, 782.

[5] A.-G. *v.* Tomline, 15 Ch. D. 152, *per* Fry, J.

[6] See Haigh *v.* Jaggar, 2 Coll. 231, 235; Lowndes *v.* Bettle, 33 L. J. Ch. 451; Stanford *v.* Hurlstone, 9 Ch. 116.

[7] It was refused in Haigh *v.* Jaggar, *u. s.* But there the defendants had been working for a considerable time before the application was made: there was a question of title involved which the plaintiffs were proceeding simultaneously to determine at law (see Haigh *v.* Jaggar, 16 M. & W. 525; 3 Exch. 54; *ante*, p. 250); and it was not suggested that the defendants were working unskilfully, or that they were insolvent. It was also refused by Lord Thurlow: see the case mentioned in Crockford *v.* Alexander, 15 Ves. 138. But afterwards he changed his opinion, and granted it: see the statements in Mitchell *v.* Dors, 6 Ves. 147; Smith *v.* Collyer, 8 *ib.* 90; Thomas *v.* Oakley, 18 *ib.* 186; Lowndes *v.* Bettle, *u. s.*, 454; and see Flamang's Case, 7 Ves. 308.

in obtaining an injunction, where mines were being wrongfully worked, or minerals wrongfully abstracted;[1] the consequences of refusing it being usually irreparable,[2] and mining operations being considered a species of trade.[3] And that Act expressly provides, that an injunction may be obtained, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise; or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable.[4] And it is not necessary for a plaintiff to wait until a trespass is actually committed. He may obtain an injunction upon a threat to commit it.[5]

Receiver and manager.

It may be proper, in a case of disputed title, instead of granting an injunction, to appoint a receiver and manager.[6]

f. Inspection.

Inspection of property may usually be had.

A litigant, who has a *primâ facie* case, may usually obtain, on interlocutory application, an order, giving himself and his agents liberty at all reasonable times to inspect his neighbour's property, for the purpose of ascertaining whether his own mine has been encroached upon. And, as ancillary thereto, he may, in proper cases, obtain liberty to measure and

[1] Mitchell *v.* Dors, 6 Ves. 147; Flamang's Case, 7 *ib.* 308; Smith *v.* Collyer, 8 *ib.* 90; Grey *v.* Northumberland, 17 *ib.* 282; Norway *v.* Rowe, 19 *ib.* 147; Field *v.* Beaumont, 1 Swanst. 208; Jefferys *v.* Smith, 1 J. & W. 302; Parrott *v.* Palmer, 3 M. & K. 632; Thomas *v.* Jones, 1 Y. & C. C. C. 510, 526; Powell *v.* Aiken, 4 K. & J. 343; Hunt *v.* Peake, Joh. 705; Wilson *v.* Grey, 3 Eq. 121; Hilton *v.* Woods, 4 Eq. 432; Wright *v.* Pitt, 12 Eq. 417; Phillips *v.* Homfray, 6 Ch. 776; Ashton *v.* Stock, 6 Ch. D. 719, 725; cases of mines: Cowper *v.* Blake, 17 Ves. 128; Thomas *v.* Oakley, 18 *ib.* 184; Ackroyd *v.* Briggs, 13 L. T. N. S. 521; cases of quarries, or stones.

[2] See Flamang's Case, *u. s.*; Cowper *v.* Blake, *u. s.*; Thomas *v.* Oakley, *u. s.*

[3] See Jefferys *v.* Smith, *u. s.*: see also *ante*, p. 57, n. [2], and other cases there cited; and see Phillips *v.* Homfray, 52 L. J. Ch. 405.

[4] S. 25. sub-s. 8.

[5] See Gibson *v.* Smith, 2 Atk. 182; Wilson *v.* Grey, 3 Eq. 121. See Judicature Act, 1873, s. 25, sub-s. 8. For the form of the injunction, see Lonsdale *v.* Curwen, 3 Bligh, 168 n., 170 n.; Walker *v.* Fletcher, *ib.* 172 n.: Baynton *v.* Leonard, Set. 203; Powell *v.* Aiken, 4 K. & J. 360; Mansel *v.* Evans, Pemb. (1st edit.) 263; Bell *v.* Joell, Set. 203; Craven *v.* Kaye, Set. 205.

[6] See Haigh *v.* Jaggar, 2 Coll. 231, 238, 239.

dial; and to make sections, plans, and surveys; and to use the neighbour's shafts and machinery; and to remove obstructions to the inspection. And the neighbour will be ordered to give all reasonable facilities in the way of ventilation and otherwise for effectuating those objects. Prior to the Judicature Acts, Courts of equity, by virtue of their original jurisdiction;[1] and Courts of law, under sect. 58 of the Com. Law Proc. Act, 1854;[2] were in the habit of making orders for those purposes. Under the early Judicature rules similar orders were made.[3] And similar orders may be made under the Rules of the Supreme Court, 1883.[4] Time will usually, if asked for, be given to answer the evidence of the applicant.[5] But a mere denial of the encroachment, without actual disproof, is usually immaterial; the right in question not depending on the balance of testimony, but on the circumstance that by its exercise the fact of the encroachment will be best ascertained.[6]

But terms will usually be imposed.

The applicant will, however, usually have to submit to the following, or most of the following, terms:—He will usually be obliged to give a reasonable notice in writing, stating the time at which he proposes that the inspection shall take place, and the names and descriptions of the persons whom he proposes as his agents for that purpose. He will not be allowed to appoint agents to whom his neighbour may reasonably object. He will not be allowed to inspect except for the purpose of ascertaining the fact of the encroachment. His neighbour will usually be allowed to attend the inspection. The obstructions which he

[1] See Kynaston *v.* East Ind. Co., 3 Swanst. 248, 262; East Ind. Co. *v.* Kynaston, 3 Bl. 153; Lonsdale *v.* Curwen, *ib.* 168 n., 171 n.; Set. 204; Walker *v.* Fletcher, 3 Bl. 172 n.; Lewis *v.* Marsh, 8 Ha. 97; A.-G. *v.* Chambers, 12 Beav. 159; Set. 204; Bennitt *v.* Whitehouse, 28 Beav. 119, 122, 123; Set. 203, 204 (and Adshead *v.* Needham, there cited); Ennor *v.* Barwell, 1 De G. F. & J. 529; Whaley *v.* Braucker, 10 Jur. N. S. 535; Phillips *v.* Homfray, 6 Ch. 776.

[2] 17 & 18 Vict. c. 125. See Bennett *v.* Griffiths, 3 E. & E. 467; Set. 204.

[3] O. 52, r. 3. See Cooper *v.* Ince Hall Co., W. N., 1876, p. 24.

[4] O. 50, r. 3.

[5] See Whaley *v.* Braucker, *u. s.*

[6] See Bennitt *v.* Whitehouse, 28 Beav. 119, 122, 123; Cooper *v.* Ince Hall Co., W. N., 1876, p. 24. See, however, Whaley *v.* Braucker, 10 Jur. N. S. 535, 536; where V.-C. Kindersley said he would not have made the order, if a plan had been produced, showing the state of the mine: and the neighbour had acknowledged its correctness, and submitted to an interlocutory injunction against encroaching.

may remove will usually be confined to such matters as rubbish, framed dams and barriers, and recently erected walls; and then only when the removal can take place without danger to life or health. And (irrespectively of considerations of life or health) he will not usually be allowed to break up his neighbour's soil. He will not be allowed to do unnecessary damage to his neighbour's property or operations. He will usually have to make good all damage which his neighbour may sustain; and he may be obliged to give security that he will do so. And he will usually have to bear all the costs of the inspection.[1]

Inspection of title deeds.

A litigant may also, in a proper case, obtain inspection of his neighbour's lease for the purpose of seeing from the parcels and plan where his boundaries are.[2]

g. Loss of Remedy.

Release.

It need hardly be said, that a release in respect of the wrongful abstraction of minerals is no defence to proceedings for an act of wrongful abstraction, of which the plaintiff was ignorant when he executed the release.[3]

Stat. of Limitations.

If six years have elapsed since the wrongful abstraction was committed, and no steps have been taken in the meantime to obtain compensation, the injured party will, in general, be barred of his remedy by the Statute of Limitations.[4] And,

[1] As to the removal of obstructions, see Walker *v.* Fletcher, 3 Bli. 178 n.; Ennor *v.* Barwell, 1 De G. F. & J. 530, 531, 532 (varying on appeal an order of V.-C. Stuart); Bennett *v.* Griffiths, 3 E. & E. 467, 470: as to giving security, see Bennett *v.* Griffiths, *u. s.*: and, as to costs, see *Mitchell* v. *Darley, &c., Co.*, 10 Q. B. D. 457; (which, for the purposes of appeal, are in the discretion of the Court, *ib.*). And, generally, as to the propositions in the text, and for forms of orders to inspect land, see the same cases; and also Lonsdale *v.* Curwen, 3 Bli. 168 n., 171 n.; Set. 204; Lewis *v.* Marsh, 8 Ha. 100; Set. 204; A.-G. *v.* Chambers, 12 Beav. 160; Set. 204; Baynton *v.* Leonard, Set. 203; Bennitt *v.* Whitehouse, 28 Beav. 122, 123; Set. 203, 204; Hilton *v.* Woods, Set. 206; Mansel *v.* Evans, Pemb. (1st edit.) 263; Cooper *v.* Ince Hall Co., W. N., 1876, p. 24; Wall *v.* Dunn, Set. 202. And for the form of an interlocutory order obliging the defendant to keep an account of the workings; and, in the event of the plaintiff succeeding, to furnish particulars of the royalty rendered to the lessor; and for liberty for the plaintiff, in the like event, to verify the accounts by inspection of the defendant's books; see Oakley *v.* Glan-y-Pwll Co., Set. (3rd edit.) 903.

[2] Wayne's, &c., Co. *v.* Powell's, &c., Co., W. N., 1880, pp. 141, 159.

[3] Eccl. Comms. *v.* N. E. R. Co., 4 Ch. D. 845.

[4] Denys *v.* Shuckburgh, 4 Y. & C. Eq. Ex. 42; Hunter *v.* Gibbons, 1 H. & N. 459; Hood *v.* Easton, 2 Jur. N. S. 917; Dawes *v.* Bagnall, 23 W.

although the Statute was enacted with reference to actions of trespass, strictly so called, it equally applies to proceedings in a Court of conscience in respect of a trespass.[1] In like manner, in the case of a continuing trespass, an account cannot, in general, be carried back further than six years.[2] And the right to plead the Statute is probably not affected by the circumstance, that the wrongdoer acted under the authority of a person who could not himself have pleaded it; as, for instance, a mortgagee.[3] With respect, however, to a continuing trespass, it has been decided, that, where the amount wrongfully abstracted has been proved, the onus lies on the wrongdoer to show what part of it was not taken within the six years.[4] And an account will be carried back further than six years, if the injured party can show, that the abstraction was intentional; and that steps were taken to conceal either the fact of the abstraction,[5] or its extent.[6] And even if the injured party can show, that he could not have discovered the wrongful act earlier than a particular period, the Statute of Limitations will only begin to run from the date of such period;[7] unless it appears, that he neglected to use reasonable diligence.[8] For an abstraction of minerals differs from a mere ordinary trespass of goods. The injured party may frequently be ignorant, and nothing may happen to excite his suspicion, that his minerals are being abstracted.[9]

R. 690; Eccl. Coms. *v.* N. E. R. Co., 4 Ch. D. 845, 857, 858. The statute in question is 21 Jac. 1, c. 16, s. 3.

[1] See Trotter *v.* Maclean, 13 Ch. D. 574, 584; Gibbs *v.* Guild, 9 Q. B. D. 67.

[2] Dean *v.* Thwaite, 21 Beav. 621; Ashton *v.* Stock, 6 Ch. D. 719, 726; Trotter *v.* Maclean, *u. s.* See also Thomas *v.* Atherton, 10 Ch. D. 202.

[3] See Hood *v.* Easton, *u. s.*; where, on appeal, the L.JJ. apparently disapproved the decision on this point of V.-C. Stuart, as reported, 2 Giff. 692. See, as to a mortgagee, *ante*, p. 85.

[4] Dean *v.* Thwaite, 21 Beav. 621; Trotter *v.* Maclean, 13 Ch. D. 574, 585.

[5] See Denys *v.* Shuckburgh, 4 Y. & C. Eq. Ex. 53; Dean *v.* Thwaite, *u. s.*, 623; Hunter *v.* Gibbons, 1 H. & N. 459; Dawes *v.* Bagnall, 23 W. R. 690; Trotter *v.* Maclean, *u. s.*, 584. See also Gibbs *v.* Guild, 8 Q. B. D. 296; 9 *ib.* 59.

[6] See Trotter *v.* Maclean, *u. s.*, 585. In Dawes *v.* Bagnall, *u. s.*, an omission by the defendants to mark the illegal workings in plans, which they kept of the workings in their own mine, was considered insufficient to constitute a case of concealed fraud.

[7] See Eccl. Comms. *v.* N. E. R. Co., 4 Ch. D. 845, 858 *et seq.*; and cf. Gibbs *v.* Guild, *u. s.*

[8] Denys *v.* Shuckburgh, *u. s.*, 42; Dean *v.* Thwaite, *u. s.* 623; Eccl. Comms. *v.* N. E. R. Co., *u. s.*, 861, 862.

[9] See Dean *v.* Thwaite, *u. s.*, 622; Trotter *v.* Maclean, *u. s.*, 581.

Running of statute, where wrongdoer demises mine, reserving rents in kind.

Where the wrongdoer has demised the mines in question, and has reserved rents by means of payment of produce in specie, the profits will be considered as accruing at the time of receiving the produce, and not at the time of its sale; and the Statute will, therefore, run from the time of the receipt.[1]

Delay.

Mere delay may induce the Court to withhold an interlocutory injunction to restrain the alleged wrongful working of a mine; especially after expenditure has been incurred; regard being had to the serious injury which might otherwise be caused.[2]

Death of wrongdoer—wrongful abstraction.

The death of the wrongdoer will not deprive the injured party of the right to recover from his estate the value of all minerals which he may have wrongfully abstracted. For a wrongful abstraction of minerals is not a mere personal tort. It is an act from which the estate of the wrongdoer derives a profit. And proceedings in the nature of an action for money had and received, or proceedings for an account, have always, therefore, been maintainable in respect of it.[3] However, where the act of the wrongdoer is a mere personal tort, the maxim, *actio personalis moritur cum personâ*, will apply; and his death may be a bar to the remedy. Thus, in *Phillips* v. *Homfray*,[4] an inquiry was directed, whether a farm and underlying mineral property belonging to the plaintiffs had sustained any, and what, damage by reason of the manner in which the defendants had abstracted the plaintiffs' minerals.[5] While the inquiry was being proceeded with, one of the defendants died. It was held, that, as against the estate of that defendant, the inquiry should be stayed.[6] Where, however, the abstraction has taken place within six months before the death, an action may, notwithstanding the maxim, be maintained under the Act 3 & 4 Will. 4, c. 42. But it must be brought within six months

Personal tort.

[1] Denys *v.* Shuckburgh, 4 Y. & C. Eq. Ex. 42.

[2] Field *v.* Beaumont, 1 Swanst. 208. See also *ante*, p. 62. n. [1], and other cases there cited.

[3] See Winchester *v.* Knight, 1 P. Wms. 407; Thomas *v.* Oakley, 18 Ves. 186; Powell *v.* Rees, 7 A. & E. 426; Powell *v.* Aiken, 4 K. & J. 352; Phillips *v.* Homfray, 6 Ch. 770; and the observations on the first inquiry in Phillips *v.* Homfray of Pearson, J., in S. C., 52 L. J. Ch. 403, 404.

[4] 6 Ch. 770.

[5] As to the right to recover for this consequential damage, see *ante*, p. 537.

[6] See 52 L. J. Ch. 401: affirmed W. N., 1883, p. 132.

after the executors or administrators undertake the administration.[1]

SECT. 3.—WRONGFUL ABSTRACTION—CRIMINAL REMEDIES.

Statutory provisions.

Whosoever shall steal, or sever with intent to steal, the ore of any metal, or any lapis calaminaris, manganese, or mundick, or any wad, black cawke, or black lead, or any coal or cannel coal from any mine, bed, or vein thereof respectively, shall be guilty of felony; and, being convicted thereof, shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.[2] And whosoever, being employed in or about any mine, shall take, remove, or conceal any ore of any metal, or any lapis calaminaris, manganese, mundick, or other mineral found or being in such mine, with intent to defraud any proprietor of or adventurer in such mine, or any workman or miner employed therein, shall be guilty of felony; and, being convicted thereof, shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.[3]

Decisions thereon.

An indictment, that the defendants being persons employed in a mine, in the parish of, &c., in the county of Cornwall, did steal ore, the property of the adventurers in the said mine, then and there being found, does not sufficiently show that the ore was stolen from the mine.[4] Where a prisoner was indicted

[1] See s. 2. See, accordingly, Powell *v.* Rees, 7 A. & E. 426.

[2] 24 & 25 Vict. c. 96, s. 38.

[3] S. 39. This section is of general application. See previously, as to Cornwall and Devon, 2 & 3 Vict. c. 58, s. 10; 18 & 19 Vict. c. 32, s. 28. Before the passing of the Act 24 & 25 Vict. c. 96, it was held, that miners, employed to bring ore to the surface, and paid by the owners according to the quantity produced, who removed from the heaps of other miners ore produced by them, and added it to their own, in order to increase their wages; the ore still remaining in the possession of the owners; were not guilty of larceny: R. *v.* Webb, 1 M. C. C. 431. Under the Act 39 & 40 Geo. 3, c. 77, persons, who wall or stack coal, ironstone or iron ore, in a fraudulent manner, and to deceive their employers; or who remove ironstone or iron ore, to defraud the persons who raise it; may be convicted before the justices, and committed for any time not exceeding three months (s. 4). But prosecutions must be begun within nine months (s. 9).

[4] R. *v.* Trevenner, 2 M. & Rob. 476.

in one count for stealing from the mine of a particular owner, and in the same count for stealing from the mines of thirty other owners coal the property of each of such other owners; and it appeared, that all the coal in question had been raised at one shaft; it was held:—(1) that the prosecutor could not be called on to elect on which charge he would go to the jury; (2) that, although the judge might direct the jury to confine their attention to one particular charge, yet that the prosecutor was entitled to give evidence in support of all the charges; and (3) that proof of such charges might be relied on to show a felonious intent.[1]

Sect. 4.—MALICIOUS INJURIES.

(*a*) *Drowning Mines.*

Statutory provision.

Whosoever shall unlawfully and maliciously cause any water to be conveyed or run into any mine, or into any subterraneous passage communicating therewith, with intent thereby to destroy or damage such mine, or to hinder or delay the working thereof, ... shall be guilty of felony; and, being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for any period not exceeding seven years, and not less than five years; or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping. But this provision does not extend to any damage committed underground by any owner of any adjoining mine in working the same, or by any person duly employed in such working.[2]

Decision thereon.

The mine may in an indictment be laid as the property of a person in possession of and working it, although only as an agent for others.[3]

(*β*) *Setting Fire to Mines.*

Statutory provisions.

Whosoever shall unlawfully and maliciously set fire to any mine of coal, cannel coal, anthracite, or other mineral fuel, shall

[1] R. *v.* Bleasdale, 2 C. & K. 765.

[2] 24 & 25 Vict. c. 97. s. 28; 27 & 28 Vict. c. 47, s. 2.

[3] R. *v.* Jones, 1 C. & K. 181: S. C., 2 M. C. C. 295.

be guilty of felony; and, being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than five years; or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.[1] And whosoever shall unlawfully and maliciously, by any overt act, attempt to set fire to any mine, under such circumstances that if the mine were thereby set fire to the offender would be guilty of felony, shall be guilty of felony; and, being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen, and not less than five, years; or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.[2]

(γ) *Injuring Airways, Waterways, Shafts, &c.*

Statutory provision.

Whosoever shall, with intent thereby to destroy or damage such mine, or to hinder or delay the working thereof, unlawfully and maliciously pull down, fill up or obstruct, or damage with intent to destroy, obstruct, or render useless, any airway, waterway, drain, pit, level or shaft of or belonging to any mine, shall be guilty of felony; and shall be liable, on conviction, to the same punishment as that provided for the drowning of a mine.[3] But this provision does not extend to any damage committed underground by any owner of any adjoining mine in working it, or by any person duly employed in such working.[4]

Decisions thereon.

Where one of two owners of adjoining mines, asserting that a certain airway belonged to him, directed his workmen to stop it up; and the workmen, acting *bonâ fide*, did so; they were acquitted, although their master knew that he had no right to the airway. But they would have been guilty, if they had

[1] 24 & 25 Vict. c. 97, s. 26; 27 & 28 Vict. c. 47, s. 2.

[2] 24 & 25 Vict. c. 97, s. 27; 27 & 28 Vict. c. 47, s. 2.

[3] 24 & 25 Vict. c. 97, s. 28; 27 & 28 Vict. c. 47, s. 2: *ante*, p. 546.

[4] 24 & 25 Vict. c. 97, s. 28.

known that the stopping up was a malicious act of their master.[1] The provision in question is intended to render a person criminally liable who acts with a wicked mind. It is not intended to apply to the *bonâ fide* exercise of a supposed right.[2]

(δ) *Injuries to Machinery and Effects.*

Generally—statutory provision.

Whosoever shall unlawfully and maliciously pull down or destroy, or damage with intent to destroy or render useless, any steam-engine or other engine for sinking, draining, ventilating or working, or for in anywise assisting in sinking, draining, ventilating or working, any mine, or any appliance or apparatus in connexion with any such steam or other engine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way or trunk, for conveying minerals from any mine, whether such engine, staith, building, erection, bridge, waggon-way or trunk be completed or in an unfinished state; or shall unlawfully and maliciously stop, obstruct, or hinder the working of any such steam or other engine, or of any such appliance or apparatus as aforesaid, with intent thereby to destroy or damage any mine, or to hinder, obstruct, or delay the working thereof; or shall unlawfully and maliciously wholly or partially cut through, sever, break or unfasten, or damage with intent to destroy or render useless, any rope, chain or tackle, of whatsoever material the same shall be made, used in any mine, or in or upon any inclined plane, railway or other way, or other work whatsoever in anywise belonging or appertaining to, or connected with, or employed in any mine, or the working or business thereof; shall be guilty of felony; and, being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven, and not less than five, years; or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement,

[1] R. *v.* James, 8 C. & P. 131. See James *v.* Phelps, 3 Per. & D. 231.

[2] R. *v.* Matthias and Twigg, 14 Cox C. C. 5.

and, if a male under the age of sixteen years, with or without whipping.[1]

Where a steam-engine used in working a mine had been stopped, and locked up for the night; and the prisoner got into the engine-house and set it going; and the engine received an injury; it was held, that this was a damaging of the engine.[2] A scaffold erected at some distance above the bottom of a mine, for the purpose of working a vein of coal on a level with the scaffold, is an 'erection used in conducting the business' of a mine.[3] And where mine owners constructed a wooden trough, by means of which water was conveyed from a spring to a pool half a mile distant from their mine, being as near as the nature of the ground admitted; and the water so brought was used for the purpose of washing the ore obtained from the mine; it was held, that the trough was an 'erection.'[4] Decisions thereon.

If any persons, riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force demolish, or pull down or destroy, or begin to demolish, pull down or destroy, any steam-engine or other engine for sinking, working, ventilating, or draining any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk, for conveying minerals from any mine, every such offender shall be guilty of felony; and, being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than five years; or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.[5] And if any persons, riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force injure or damage any such engine, staith, bridge, waggon-way, Rioters—statutory provisions.

[1] 24 & 25 Vict. c. 97. s. 29; 27 & 28 Vict. c. 47. s. 2. Previously to 24 & 25 Vict. c. 97. it was held, that, where a mine was worked by a steam engine, which caused a cylinder to revolve, and take up the rope as the coal was drawn up; and the cylinder was damaged; proof of such damage would not support an indictment charging the damaging of the steam-engine: see R. *v.* Whittingham, 9 C. & P. 234.

[2] R. *v.* Norris, 9 C. & P. 241.

[3] R. *v.* Whittingham, *ib.* 234.

[4] Barwell *v.* Winterstoke, 14 Q. B. 704.

[5] 24 & 25 Vict. c. 97. s. 11; 27 & 28 Vict. c. 47, s. 2.

or trunk, every such offender shall be guilty of a misdemeanour; and, being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years, and not less than five years; or to be imprisoned for any term not exceeding two years, with or without hard labour. And if, upon the trial of any person for any felony under the first of these provisions, the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of any offence under the second of these provisions, then the jury may find him guilty thereof; and he may be punished accordingly.[1]

[1] 24 & 25 Vict. c. 97, s. 12; 27 & 28 Vict. c. 47, s. 2. See, as to Scotland, 9 Geo. 3, c. 29; 56 Geo. 3, c. 125; Ireland, 5 & 6 Vict. c. 28, s. 5. Under the Act 7 & 8 Geo. 4. c. 31, the inhabitants of the hundred, wapentake, ward, or other district in the nature of a hundred, in which any offence mentioned in the first of the above-stated provisions is committed, are liable to yield full compensation to the person damnified for the damage done; including any damage at the same time done to any fixture, furniture or goods in the building or erection in question (s. 2). See, as to procedure, ss. 3 *et seq.*

CHAPTER XXIII.

TAXES, DUTIES, RATES AND TITHES—PAUPER SETTLEMENTS.

Sect. 1.—LAND TAX.

All quarries, mines of coal, tin, lead, copper, mundic, iron and other mines, iron mills, furnaces, and other iron works, salt works, and alum mines and works, are, under the Act 38 Geo. 3, c. 5, subject to Land Tax.[1] And, although in strictness mines or quarries cannot, it would seem, be properly so called until they are opened,[2] the Act probably applies to them, although they may not have been opened when it was passed. They are nothing more than land and the potential profit of land in existence at the time the Act was passed.[3] Land Tax.

Sect. 2.—INCOME TAX.

a. Property Liable—Chargeable Value.

Independently of sect. 8 of the Act, 29 & 30 Vict. c. 36, mines and quarries are assessable to the Income Tax under Schedule A. of the Act, 5 & 6 Vict. c. 35. Under No. III. of that Schedule "quarries of stone, slate, limestone, and chalk," are assessable on the amount of profits in the preceding year. Under the same number "mines of coal, tin, lead, copper, mundic, iron, and other mines," are assessable on the full amount for one year, or on an average of the five preceding years. But, if any 'mine' has, from some unavoidable cause, been decreased and is decreasing in annual value, so that the 5 & 6 Vict. c. 35, Sch. A.

[1] See s. 4.

[2] See *ante*, p. 2.

[3] See Colchester *v.* Kewney, L. R. 2 Exch. 257, 258. Cf. R. *v.* Randall, 4 E. & B. 564, 569.

average of five years will not give a fair estimate of the annual value, the annual value may, under No. IV. of that Schedule, be computed on the actual amount of profits in the preceding year, subject to the usual abatement on account of diminution of duty in the current year. And if any 'mine' shall have wholly failed, the assessment may, under the same number, be wholly discharged.[1] Under No. III. of that Schedule, "iron works, salt works, and alum mines or works, water works, &c., railways, &c., and other concerns of the like nature from or arising out of any lands, tenements, &c.," are assessable on the profits of the year preceding. And, generally, all lands, tenements, or hereditaments capable of actual occupation, and not coming within the foregoing specific principles, are, under No. I. of that Schedule, assessable according to their annual value.

Slate mines—brickfields.

As the Act distinguishes between 'quarries of slate' and 'mines,' and applies to each a different principle of assessment, works for the getting of slate are assessable as 'quarries,' and not as 'mines;' although the slate be obtained by underground working.[2] Brick fields are either within the principle applicable to iron works, salt works, and alum works; or within the general principle.[3]

29 & 30 Vict. c. 36, s. 8.

Sect. 8 of the Act, 29 & 30 Vict. c. 36, enacts that "the several and respective concerns described in No. III. of Schedule A." of the Act, 5 & 6 Vict. c. 35, shall be assessed "in the manner in the said No. III. mentioned, according to the rules prescribed by Schedule D. of the said Act, so far as such rules are consistent with the said No. III;" with a special proviso as to railways. And Schedule D., which provides for the assessment in respect of any "trade, manufacture, adventure, or concern in the nature of trade not contained in any other Schedule," requires the assessment to be made on a sum not less than the full amount of the balance of the profits or gains "upon a fair and just average of three years."

[1] 'Fifth rule, No. III.,' mentioned in No. IV. r. 5., is an obvious mistake for 'second rule, No. III.'

[2] Jones *v.* Cwmorthen Slate Co., 4 Exch. D. 97; 5 *ib.* 93. For the difference between a mine and a quarry, see *ante*, pp. 3 *et seq.*

[3] Edmonds *v.* Eastwood, 2 H. & N. 811.

Sect. 8 of the Act, 29 & 30 Vict. c. 36, appears to have abolished No. IV. of Schedule A. of the Act, 5 & 6 Vict. c. 35, and to have substituted the rules in Schedule D.[1] As to its effect in other respects there is considerable doubt. It was laid down in *Knowles* v. *McAdam*,[2] that it makes the three-year period applicable to such cases as that of a colliery company, formed for the purpose of carrying on the business of working coal mines. And it was laid down in *Ryhope, &c., Co.* v. *Foyer*,[3] that it makes that period applicable to all cases of mines. *Knowles* v. *McAdam* was, however, expressly dissented from in *Coltness, &c., Co.* v. *Black*;[4] a case before the House of Lords. And, if the principle which *Knowles* v. *McAdam* and *Ryhope, &c., Co.* v. *Foyer* laid down be correct, not merely would 'mines' be reduced from a five-year to a three-year period. 'Quarries,' which, probably owing to their comparative freedom from fluctuation in value, were originally placed in a single-year period, would be raised from that period to a three-year period.[5] It is hard to find any solid reason why these changes should be made. It is suggested, especially having regard to its proviso as to railways, that by sect. 8 of the Act, 29 & 30 Vict. c. 36, it was intended to change to the three-year period those only of the concerns mentioned in No. III. of Schedule A. of the Act, 5 & 6 Vict. c. 35, which consist of "iron works, salt springs or works, alum mines or works, water works, &c., railways, &c., and other concerns of the like nature." Effect of this provision.

If the three-year period is now applicable to a colliery company, and the company has acquired the rights and liabilities of a previous company, it has not, under the rules of Schedule D., "been set up and commenced" within that period; so as to entitle it to have the computation made on the average of the Ryhope, &c., Co., *v.* Foyer.

[1] See Ryhope, &c., Co. *v.* Foyer, 7 Q. B. D. 500, *per* Lindley, J.; Coltness, &c., Co. *v.* Black, 6 App. Cas. 337, *per* Lord Blackburn.

[2] 3 Exch. D. 23, *per* Kelly, C.B., and Cleasby and Pollock, BB.

[3] 7 Q. B. D. 485, *per* Grove and Lindley, JJ.

[4] 6 App. Cas. 337, 338, 339, *per* Lord Blackburn.

[5] See Coltness, &c., Co. *v.* Black, 6 App. Cas. 338, *per* Lord Blackburn. Cleasby, B., in Knowles *v.* M'Adam (3 Exch. D. 30) refused to admit this consequence.

balance from the date of the first "setting up."[1] Nor (independently of whether No. IV. of Schedule A. is not now abolished),[2] is such a company entitled, under that number, to have its profits estimated in proportion to the profits received since the commencement of its "possession or interest;" on the ground that, by reason of its possession or interest having commenced within the three-year period, it cannot make out the statutory account.[3] It has, on the contrary, under the rules of Schedule D., "succeeded to" the previous company; so as to retain the position which it would have held, if it had been identical therewith.[4] It may, however, under those rules, prove that its profits and gains have fallen short from some "specific cause;" so as to entitle it to have the computation made "on the amount of the full value of the profits and gains received annually;" or, in other words, on the gains for the current year. And an extraordinary depression in the coal trade may not improperly be called a "specific cause."[5]

Profits and gains—realised property.

The tax, as might be expected from its title, is essentially a tax upon profits and gains. Where, for example, a principal debt is made repayable by periodical instalments, none of the instalments are chargeable.[6] And where the purchase-money of an estate is made payable by periodical instalments, although each instalment may in substance be partially compounded of interest, it is not within the purview of the Acts.[7] Consistently, however, with this, the tax is a tax upon property. It assumes the ownership of a mine or quarry; disregards the amount it may have cost, either in the way of purchase or of rent; proceeds to describe the method of calculating its 'annual value;' and declares, that this shall be the average 'profit received therefrom.'[8] A mine owner, as distinguished from a merchant or trader, is, in fact, in every case taxed in respect of his mine as a fixed and realized 'property,' which belongs to him, and from which he reaps an annual benefit. And the statutory

[1] See Ryhope, &c., Co. *v.* Foyer, 7 Q. B. D. 485.
[2] See preceding page.
[3] See Ryhope, &c., Co. *v.* Foyer, *u. s.*
[4] *Ib.*
[5] *Ib.*
[6] Foley *v.* Fletcher, 3 H. & N. 779, 784.
[7] *Ib.* p. 769.
[8] Coltness Co. *v.* Black, 6 App. Cas. 326, *per* Lord Penzance.

words, 'annual value,' or 'profit received,' are used not as the subject of taxation; but only as the measure of the taxation to which the 'property' is subject.[1]

It follows that deductions are not allowable in respect of capital, merely because it is exhausted or consumed in making the profit.[2] They are not, for example, necessarily allowable for amounts expended in sinking a pit; which may constitute a permanent addition to capital.[3] Nor, for similar reasons, are they allowable for the year's depreciation of all the pits in a mine, whenever sunk.[4] Nor are deductions allowable in respect of capital, which is withdrawn,[5] or which suffers diminution.[6] However it may be, that in some cases a mine owner is entitled to an allowance in respect of the cost of sinking a pit, if that pit be exhausted by the workings of the year in which it is sunk.[7] And deductions are always allowable for depreciation of machinery or plant.[8] Allowances.

b. Person Liable.

In the cases subject to the specific principles prescribed by the Act, 5 & 6 Vict. c. 35,[9] the duty is, under No. III. of Schedule A., chargeable on the person, corporation, company or society, carrying on the concern; or on their agents, treasurers, or other officers; on the amount of the produce or value; and before paying, rendering, or distributing the same either between the different persons or members, or to the owner of the soil or property, or to any creditor or other claimant. And all such persons, companies, or societies are bound to allow out of such produce or value a proportionate deduction of the duty. And, in respect of any mine carried on by a company of adventurers, the duty is, under the same number, chargeable on the com- Generally.

[1] *Ib.* p. 327. *per* Lord Penzance.

[2] Addie *v.* Inland Revenue, cited in Forder *v.* Handyside, 1 Exch. D. 233; Coltness Co. *v.* Black, 6 App. Cas. 315. The latter case overruled Knowles *v.* M'Adam, 3 Exch. D. 23.

[3] Addie *v.* Inland Revenue, *u. s.*

[4] Coltness Co. *v.* Black, *u. s.*

[5] See Sch. D. of 5 & 6 Vict. c. 35.

[6] 5 & 6 Vict. c. 35, s. 159.

[7] See Coltness Co. *v.* Black, 6 App. Cas. 324, *per* Lord Cairns; 339, *per* Lord Blackburn: see, however, p. 326, *per* Lord Penzance.

[8] See 41 & 42 Vict. c. 15, s. 12. See, before the Act, Addie *v.* Inland Revenue, *u. s.*; Forder *v.* Handyside, *u. s.* Cf., as to allowances in the case of rating, *post*, pp. 562, 563.

[9] See *ante*, pp. 551. 552.

pany jointly. But any adventurer may claim to be charged separately; in order to set off his loss in one concern against his profits in another.

Retainer.

Every person, who is liable to the payment of any rent, or any yearly interest of money, or any annuity or other annual payment; whether payable half yearly, or at shorter or more distant periods; may, on making the payment, deduct and retain the amount of the duty according to the rate.[1] Accordingly, where, on the lease of a brick field, there was a reservation for "royalty or brick rent the yearly sum of £100," and for every thousand bricks to be made in any year over and above the first million "an additional royalty or brick rent of 2s.," it was held that the lessee was entitled to deduct and retain thereout the amount of the duty.[2] Of course, however, the person claiming the right to deduct must show in the first instance a liability to the charge. Where, for instance, on the lease or sale of a mine, the consideration is a fixed sum payable by periodical instalments, as none of the instalments are in fact chargeable,[3] they are not sums out of which the duty may be deducted.[4]

c. *Place of Liability.*

Place of liability.

Under No. IV. of Schedule A. of the Act, 5 & 6 Vict. c. 35, "mines of coal, tin, lead, copper, mundic, iron, and other mines," are chargeable in the place where they are situate, or where their produce is manufactured.

d. *Appeals.*

Appeals.

Persons assessed for mines or quarries may, if they think proper, appeal against such assessment to the Commissioners for special purposes instead of to the Commissioners for general purposes.[5]

[1] 5 & 6 Vict. c. 35, s. 102; 16 & 17 Vict. c. 34, s. 40; Sch. D.

[2] Edmonds *v.* Eastwood, 2 H. & N. 811.

[3] *Ante*, p. 554.

[4] Taylor *v.* Evans, 1 H. & N. 101; Foley *v.* Fletcher, 3 *ib.* 769.

[5] 23 & 24 Vict. c. 14, s. 7.

SECT. 3.—SUCCESSION DUTY.

Open mines.

For the purposes of the Succ. Duty Act the yearly value of an opened[1] mine is ascertainable upon the average profits or income, after deducting all necessary outgoings, during such a number of preceding years as may be agreed upon between the Commissioners and the successor. And if no agreement is come to, the principal value must be ascertained; and the annual value is then considered to be equal to interest at £3 per cent. per annum on the amount of such principal.[2]

New mines.

It is probable that unopened[1] mines have an annual value within the meaning of the Act. Although they neither yield, nor are capable in their existing state of yielding, any annual income, yet they are saleable, and would fetch considerable sums in the market.[3] However, property, which is increased in value by the discovery of minerals therein, the previous existence of which was unknown, is not within the contemplation of the Act.[4]

SECT. 4.—RATES.

a. Property Liable.

Mines and quarries.

Mines and quarries of every description are rateable to the relief of the poor;[5] and are also liable to all county

[1] As to open and new mines, see *ante*, pp. 22 *et seq.*

[2] 16 & 17 Vict. c. 51, s. 26.

[3] See A.-G. *v.* Sefton, 11 H. L. C. 257, 268, *per* Lord Westbury. 'Unopened mines' at p. 268 is no doubt a misprint for 'opened mines.' Lord Chelmsford seems to have inclined to the same view (see p. 279). But Lord Wensleydale refused to express an opinion upon the point (see p. 273). See the question asked by Lord Wensleydale at p. 263. The House of Lords affirmed A.-G. *v.* Sefton, 2 H. & C. 362; in which the majority of the Court were of opinion, that unopened mines were not within the Act.

[4] See A.-G. *v.* Sefton, 11 H. L. C. 271, *per* Lord Wensleydale. See the question asked by Lord Westbury at p. 262.

[5] 43 Eliz. c. 2: Rat. Act. 1874 (37 & 38 Vict. c. 54), s. 3. Prior to the latter Act the law as to the rateability of mines and quarries to the poor was in a very anomalous state. By 43 Eliz. c. 2, it was enacted (s. 1) that the churchwardens and overseers of every parish should raise by taxation of every 'occupier of lands, houses, tithes, coal mines, or saleable underwoods,' a sufficient sum of money for the relief of the poor according to the ability of the parish. Limeworks (Atkins *v.* Davis, Cald. 338; R. *v.* Alberbury, 1 East. 534); brickworks (R. *v.* Westbrook. R. *v.* Everist, 10 Q. B. 178); slateworks (R. *v.* Woodland.

rates,[1] borough rates,[2] highway rates,[3] and other local rates

2 East, 164); clay pits (R. *v.* Brown, 8 East, 528); and gravel, sand, or marl pits (R. *v.* Woodland, 2 East, 167); which were really such, and were not mines in the proper sense of that word (*ante*, pp. 3 *et seq.*); were treated as 'lands' within the meaning of the Act; and were therefore rateable. Coal mines having been expressly mentioned in the Act were, of course, also rateable. But, having been alone mentioned, a long course of decision had established, that lead mines (Lead Co. *v.* Richardson, 3 Burr. 1341; Rowls *v.* Gells, 2 Cowp. 453); ironstone mines (R. *v.* Cunningham, 5 East, 478; R. *v.* Bilston, 5 B. & C. 851; Crawshay *v.* Morgan, L. R. 4 Q. B. 581; affirmed Morgan *v.* Crawshay, L. R. 5 H. L. 304: Guest *v.* East Dean, L. R. 7 Q. B. 334; Kittow *v.* Liskeard, 10 *ib.* 15); limestone mines (R. *v.* Sedgley, 2 B. & Ad. 65); freestone mines (R. *v.* Dunsford, 2 A. & E. 568; R. *v.* Randall, 4 E. & B. 564); clay mines (R. *v.* Brettel, 3 B. & Ad. 424): salt mines (R. *v.* Sedgley, 2 B. & Ad. 74); and all other mines than coal mines (R. *v.* Baptist Mill Co., 1 M. & S. 618; Crease *v.* Sawle, 2 Q. B. 886; Kittow *v.* Liskeard, *u. s.* 12); were exempt from the liability. It had also, by a very peculiar doctrine (*per* Blackburn, J., in Roads *v.* Trumpington, L. R. 6 Q. B. 64), been established, that, where mines other than coal mines were in lease or occupation; and the lessor, or person receiving, received a money rent (R. *v.* Rochester, 12 East, 353; R. *v.* Baptist Mill Co., *u. s.*, 619; R. *v.* Welbank, 4 M. & S. 222; R. *v.* Tremayne, 4 B. & Ad. 162; R. *v.* Crease, 11 A. & E. 577); or a proportionate part of the produce of the mines in an altered state (R. *v.* Pomfret, 5 M. & S. 139); he was not liable to be rated: but that, where he received a proportionate part of the produce in its natural and primitive state; as under the custom of tinbounding in Cornwall (R. *v.* St. Agnes, 3 T. R. 480; R. *v.* Crease, 11 A. & E. 677; Crease *v.* Sawle, 2 Q. B. 862, 886; *ante*, pp. 430, 431); or under the custom of Derbyshire (Rowls *v.* Gells, 2 Cowp. 451; *ante*, p. 511); or under express stipulation (R. *v.* Baptist Mill Co., 1 M. & S. 612; R. *v.* St. Austell, 5 B. & Al. 693; R. *v.* Todd, 12 A. & E. 816); he was so liable. And it had been further established, that the occupiers of surface land, with buildings and machinery thereon; or of a watercourse; used in connection with a mine not itself rateable under the Act of Eliz.; were rateable in respect of such surface buildings and machinery (Guest *v.* East Dean, L. R. 7 Q. B. 334; Kittow *v.* Liskeard, 10 *ib.* 7); or of such watercourse (Talargoch Co. *v.* St. Asaph, L. R. 3 Q. B. 478): overruling R. *v.* Bilston, 5 B. & C. 851; according to which the subsidiary property was to be regarded as part of the mine itself, and as not therefore rateable. The Rat. Act, 1874 (s. 3) extended the liability to mines of every kind not mentioned in the Act of Eliz.

[1] Under the consolidating Act, 15 & 16 Vict. c. 81, all hereditaments then rateable to the relief of the poor were made rateable to the county rates; and by the Rat. Act, 1874 (ss. 10, 15), all hereditaments thereby made rateable to the relief of the poor (see *supra*) were made rateable to the county rates.

[2] See 5 & 6 Will. 4, c. 76, s. 92; Rat. Act. 1874, ss. 10, 15.

[3] The Act 5 & 6 Will. 4, c. 50, s. 27, made rateable for highway purposes "all property now liable to be rated and assessed to the relief of the poor, provided that the same rate shall also extend to such woods, mines, and quarries of stone or other hereditaments, as have heretofore been usually rated to the highways." The liability under this Act to highway rates was, accordingly, capable of a greater

leviable upon property rateable to the relief of the poor.[1]

Subsidiary property.

And the rateability extends to surface lands, roads, and water-courses; and to shafts, buildings, and machinery; used in connexion with a mine or quarry.[2] And it also extends to land, buildings, and machinery; and to roads; of which a person working a mine or quarry is in exclusive occupation; although he be only working under a license.[3]

Rateability depends on working, not profitableness.

Mines or quarries, if they are actually being worked, are rateable, although they may be unprofitable.[4] They are not, however, rateable before they are worked, and become productive;[5] or after they have ceased to be productive.[6] And, although the occupiers of mines or quarries, which have ceased to be productive, are rateable in respect of surface lands occupied therewith; they are not rateable in respect of buildings, boilers, engines, plant, or railways so occupied; if these things are in substance only part thereof, and are not shown to have any independent value.[7]

b. Chargeable Value.

(*a*) *Hypothetical Rent—Double Rating.*

Hypothetical rent—Mines (not being tin, lead, or copper) and quarries.

Mines or quarries, other than tin mines, lead mines, or copper mines, are rateable upon an estimate "of the rent, at which

extension than the liability to poor rates; which, so far as related to mines, was confined to coal mines (*ante*, p. 558, n.). And it was decided, that this liability was not limited to the identical mines actually rated before the passing of the Act; but that it applied to mines of the same description as those previously usually rated in the parish in question, although opened and worked for the first time subsequently to the passing of the Act. See R. *v.* Randall, 4 E. & B. 564, a case of a stone mine. By the Rat. Act, 1874, all hereditaments thereby made rateable to the relief of the poor were made rateable to the highway rates: ss. 10, 15. See also Pub. Hea. Act, 1875, ss. 144, 216.

[1] See, as to 'lighting' and 'watching,' 3 & 4 Will. 4, c. 90, s. 9; Pub. Hea. Act, 1875, s. 163; 'general district rate,' Pub. Hea. Act, 1875, s. 211. See also Rat. Act, 1874, ss. 10, 15.

[2] See *ante*, p. 558, n. See also R. *v.* Granville, 9 B. & C. 188; Tyne Co. *v.* Wallsend, 46 L. J. M. C. 185.

[3] Roads *v.* Trumpington, L. R. 6 Q. B. 56; Kittow *v.* Liskeard, 10 *ib.* 7. A mere licensee, as such, is not rateable: see *post*, p. 563.

[4] R. *v.* Parrot, 5 T. R. 593, 596; R. *v.* Bedworth, 8 East, 387; R. *v.* St. Austell, 5 B. & Al. 699.

[5] R. *v.* Rochester, 12 East, 358; R. *v.* Fayle, 27 L. T. 65.

[6] R. *v.* Bedworth, *u. s.*; R. *v.* Westbrook, 10 Q. B. 202.

[7] Tyne Co. *v.* Wallsend, *u. s.*

the same might reasonably be expected to let from year to year; free of all usual tenants' rates, and taxes, and tithe commutation rent-charge (if any); and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent."[1] Where such mines or quarries are in the occupation of a lessee; although the sums, which he pays, whether by way of rent strictly so called, or by way of royalty, or by way of rent and royalty, do not necessarily form the basis of the rate in the sense of determining its amount; they are all within the statutory meaning of 'rent.'[2]

Tin, lead, or copper mines —statutory meanings of 'mine,' 'dues,' 'lease,' and 'fine.'

In the Rat. Act, 1874, the following words, when applied to a tin, lead, or copper mine, have or include the following meanings: — The word 'mine,' when a mine is occupied under a lease, includes the underground workings, and the engines, machinery, workshops, tramways, and other plant, buildings (not being dwelling-houses), and works and surface of land occupied in connexion with, and for the purposes of, the mine, and situate within the boundaries of the land comprised in the lease or leases, under which the dues, or dues and rent, are payable or reserved. The word 'dues' means dues, royalty, or toll, either in money, or partly in money and partly in kind; and the amount of dues, which are reserved in kind, means the value of such dues. The word 'lease' means lease or sett, or license to work, or agreement for a lease or sett, or license to work. And the word 'fine' means fine, premium, or foregift, or other payment or consideration in the nature thereof.[3]

Statutory meanings of 'gross value,' and 'rateable annual value.'

Where a tin, lead, or copper mine is occupied under a 'lease' or 'leases' granted without 'fine,' on a reservation wholly or partly of 'dues' or rent, the 'gross value' is the annual amount of the whole of the 'dues' during the year ending on the 31st December preceding the date at which the valuation list or poor-rate[4] is made; in addition to the annual amount of any

[1] See the Par. Ass. Act, 6 & 7 Will. 4. c. 96, s. 1. See also 15 & 16 Vict. c. 81, s. 6; Pub. Hea. Act, 1875, s. 211. Cf. the decision, before the Par. Ass. Act, of R. *v.* Attwood, 6 B. & C. 277.

[2] R. *v.* Attwood, *u. s.*: R. *v.* Westbrook. R. *v.* Everist, 10 Q. B. 178, 203, 207.

[3] See s. 7.

[4] See s. 15.

reserved fixed rent, which may not be paid or satisfied by such 'dues.' And the 'rateable annual value' is the same as the gross value; except that, where the person receiving the 'dues' or rent is liable for repairs, insurance, or other expenses necessary to maintain the mine in a state to command the annual amount of 'dues' or rent, the average annual cost of the repairs, insurance, and other expenses for which he is so liable, is deducted from the gross value for the purpose of calculating the rateable value.[1] Where any such mine is occupied under a 'lease' granted wholly or partly on a 'fine;' or where any such mine is occupied and worked by the owner; or, in the case of any other such mine, to which the other provisions as to tin, lead, and copper mines do not apply, and of which the royalty or 'dues' are not wholly reserved in kind;[2] the gross and rateable annual value are the annual amount of the 'dues,' or 'dues' and rent, at which the mine might reasonably be expected to let without 'fine' on a lease of the ordinary duration, according to the usage of the country; if the tenant undertook to pay all tenants' rates and taxes, and tithe rent-charge; and also the repairs, insurance, and other expenses necessary to maintain the mine in a state to command such annual amount of 'dues,' or 'dues' and rent.[3]

Snailbeach Co. *v.* Forden—double rating.

A lease comprised a lead mine, land and works; the mine and most of the works being in the union in question, and the land and the remaining works being in the neighbouring union. After the ore was crushed and washed, it was taken by a tramway about half a mile to a smelting house, forming part of the works in the neighbouring union, and was there converted into lead for sale. It was held, (1) that the crushing, washing, and smelting works were all included under 'mine,' as above defined, as being "in connexion with, and for the purposes of the mine;" (2) that the rating authorities were not entitled to assess any part of the mine twice over; and, accordingly, (3) that, in order to obtain the rateable value of the mine in the union in question, a deduction should be made from the gross dues in respect of the rateable premises in the neighbouring union.[4]

[1] S. 7.
[2] See s. 13.
[3] See s. 7.
[4] Snailbeach Co. *v.* Forden, 35 L. T. N. S. 514.

(β) *Other Circumstances determining Amount.*

Royalty.

In making a prospective rate on a lessee, who pays royalty, the rate should, in order to calculate the royalty, be, in general, assessed on the following principle :—Regard should, in general, be had to the quantum, which the plant and machinery used in the particular working are capable of producing within the year of rating, in the absence of proof, that such quantum cannot or will not be produced ; and on the quantum, which they are supposed to produce in the particular year.[1] If, however, the lessee shows, that he could not prudently contract by anticipation to pay more than an amount smaller than the calculated royalty, the smaller amount will be the true criterion according to which to rate him.[2]

Enhanced value.

A licensee of the right of working coprolites in a parish, in which the rates were made quarterly, dug ten acres every year ; and was in possession of ten acres one whole year ; but only exhausted about two and a quarter acres in each quarter. Three acres and a half were the greatest quantity used by him at any one time for coprolite purposes ; and six acres and a half, from which the coprolites had been raised, always lay unproductive. His occupation was perpetually shifting. It was held, that he was rateable in each quarterly rate in respect of ten acres at their enhanced or coprolite value.[3] The amount, at which property used in connection with a mine is rateable, is not the mere amount of the agricultural value of the land on which such property stands ; but the amount of the enhanced value which the land has through the existence of such property.[4] The convenience and situation of a mine or quarry should be considered in estimating its rateability. But the actual profits which its occupier makes are not material, and cannot be allowed to influence the assessment.[5]

Convenience and situation —profits.

Allowances.

An allowance may be made in respect of rates on account of

[1] R. *v.* Westbrook, R. *v.* Everist, 10 Q. B. 178.

[2] *Ib.* See p. 206.

[3] R. *v.* Whaddon, L. R. 10 Q. B. 230, *per* Mellor, Lush, and Archibald, JJ. ; Cockburn, C.J., dissenting.

[4] See Talargoch Co. *v.* St. Asaph, L. R. 3 Q. B. 478 ; 9 B. & S. 210 ; a case of a watercourse.

[5] R. *v.* Aylesford, 26 L. T. N. S. 618.

the necessity of repairing and replacing works and engines.[1] But in no case can an allowance be made for expenditure in rendering mines or quarries productive.[2] Nor can the amount of the rate be affected by the circumstance that the subject-matter is being gradually exhausted.[3]

c. Person Liable.

The person liable is the occupier.[4] And by this is meant the person who has the sole and exclusive possession;[5] either by himself, or by his servants or agents.[6] Generally.

A person, who has a mere license to remove the produce of a mine or quarry, without more, is not an occupier of it; and is not, therefore, rateable.[7] And, although a person, who has a license to work a whole mine or quarry, and who enters on a part, may be in constructive possession of the whole,[8] he is only, for rating purposes, in occupation of the part.[9] But where a licensee has an exclusive right to occupy the soil containing the mine in question, he may be rateable in respect of such soil.[10] And where a licensee agreed to "forthwith enter upon" land, and there dig, and effectually fence the excavations, and complete them by a given time, and reinstate the land, and then "yield and deliver up" the land to the grantor; and the excavations and works contemplated by the agreement required a constant occupation of the land; and it was impossible to use the land for any other purpose from the commencement of the excavations until the reinstatement; it was held, that the Licensee.

[1] R. *v.* Tomlinson, 9 B. & C. 163, 166; R. *v.* Granville, *ib.* 191.

[2] R. *v.* Attwood, 6 *ib.* 677; R. *v.* Westbrook, R. *v.* Everist, 10 Q. B. 178; Coltness Co. *v.* Black, 6 App. Cas. 331.

[3] R. *v.* Attwood, *u. s.*; R. *v.* Westbrook, R. *v.* Everist, *u. s.*; Coltness Co. *v.* Black, *u.s.* Cf., as to Income Tax, *ante*, p. 555.

[4] See s. 1 of 43 Eliz. c. 2, cited *ante*, p. 557 n. [5].

[5] Talargoch Co. *v.* St. Asaph, L. R. 3 Q. B. 484; Kittow *v.* Liskeard, 10 *ib.* 13, 14; R. *v.* Whaddon, *ib.* 242.

[6] Kittow *v.* Liskeard, L. R. 10 Q. B. 7.

[7] See R. *v.* Trent Co., 4 B. & C. 57; R. *v.* Alnwick, 9 A. & E. 444; Roads *v.* Trumpington, L. R. 6 Q. B. 62; Morgan *v.* Crawshay, L. R. 5 H. L. 316; Kittow *v.* Liskeard, L. R. 10 Q. B. 13; R. *v.* Whaddon, *ib.* 244. Cf. L. & N. W. R. *v.* Buckmaster, *ib.* 70, 444.

[8] See *ante*, p. 42.

[9] R. *v.* Fayle, 27 L. T. 64, 65.

[10] *Ib.*; Roads *v.* Trumpington, L. R. 6 Q. B. 56.

licensee had the exclusive right to occupy the soil; and was rateable accordingly.[1]

Grantee of easement.

A person, who has a mere easement to use a wayleave,[2] or waterleave,[3] for mining purposes, is not an occupier; so as to make him rateable in respect of it. But if, under a grant of a wayleave with liberty to erect a bridge, the grantee makes a way, and incloses it, and thereby excludes all other persons, he becomes an occupier of the wayleave for rating purposes.[4] And, if the grantee of a waterleave constructs a watercourse with pipes and culverts, he becomes an occupier of the land containing them.[5]

Cost-book company—galee.

The members of a cost-book company may have an occupation for rating purposes.[6] But the purser, secretary, and chief managing agent for the time being, of any tin, lead, or copper mine, or any of them, may, if the overseers or other rating authority think fit, be rated as the occupier.[7] The interest of a galee of mines or quarries in the Forest of Dean, or Hundred of St. Briavels,[8] is probably capable of occupation for rating purposes.[9]

Rateability depends on occupancy, not title.

A person in actual occupation, although a licensee, or even a mere trespasser, is rateable. For the nature of his title is, for rating purposes, immaterial.[10]

Lessor, &c., sometimes rateable—tin-bounder—Derbyshire custom.

However, where a mine other than a coal mine[11] is in lease or occupation, and the rent or royalty or due is wholly reserved or received in kind, whether under the custom of tin-bounding in Cornwall,[12] or under express stipulation,[13] the lessor or person receiving is rateable, as being in receipt of a portion of the mine, and the lessee or occupier is exempt.[14] And, even where

[1] Roads *v.* Trumpington, L. R. 6 Q. B. 56.

[2] R. *v.* Jolliffe, 2 T. R. 90.

[3] Talargoch Co. *v.* St. Asaph, L. R. 3 Q. B. 484.

[4] R. *v.* Bell, 7 T. R. 598.

[5] Talargoch Co. *v.* St. Asaph, *u. s.*, 478.

[6] Kittow *v.* Liskeard, L. R. 10 Q. B. 7.

[7] Rat. Act, 1874, s. 7.

[8] See *ante*, p. 483.

[9] Morgan *v.* Crawshay, L. R. 5 H. L. 304.

[10] R. *v.* Bell, 7 T. R. 598; Kittow *v.* Liskeard, *u. s.* 13, 14, 15.

[11] In the case of coal mines the lessee was always rateable: see *ante*, p. 558, n.

[12] See R. *v.* St. Agnes, 3 T. R. 480; R. *v.* Crease, 11 A. & E. 679; Crease *v.* Sawle, 2 Q. B. 862, 886. See *ante*, pp. 431, 432, 558, n.

[13] R. *v.* Baptist Mill Co., 1 M. & S. 612; R. *v.* St. Austell, 5 B. & Al. 693; R. *v.* Todd, 12 A. & E. 816.

[14] This was so before the Rat. Act,

a lessor has the option of receiving the royalty in kind or in money; and he elects to receive it in money; he is rateable, and the lessee is exempt.[1] And the liability of the lessor is not affected by the circumstance, that the property in question is not, in strictness, of itself, and apart from adjoining property demised to the same lessee, a mine; if no part of such adjoining property is at the time in process of working.[2] Indeed, even if such adjoining property is at the time in process of working, the lessor is nevertheless apparently rateable.[3] For although one mine may extend through the properties of a variety of owners, each property may contain a mine for rating purposes.[4] Although, however, in such cases, the lessee may be exempt, his exemption is confined to the mine itself. He is rateable in respect of shafts, buildings, and machinery; and of surface land, and watercourses; used in connexion therewith.[5] Before the Rat. Act, 1874, a lessee of Crown mines subject to the Derbyshire custom, or a lessee under any other person entitled to the mineral duties,[6] was rateable, as being in receipt of a portion of the mine; and the miner was exempt.[7] But it may be doubted whether the Act has not altered the position of the miner in that respect.[8] Whether the grantor of a wayleave, who receives a rent or royalty in respect of it, and whose grantee is exempt, is himself liable in respect of the rent or royalty, appears doubtful.[9]

Deduction from rent.

The liability to rates of mines other than coal mines was first established by the Rat. Act, 1874.[10] It was accordingly thereby enacted that, where any poor or other 'local' rate; which, at the commencement of the Act,[11] any lessee, licensee, or grantee of a

1874 (see *ante*, p. 558, n.). And the law has not been changed: see Rat. Act, 1874, s. 13; Van Mining Co. *v.* Llanidloes, 1 Ex. D. 310.

[1] R. *v.* St. Austell, 5 B. & Al. 693; Van Mining Co. *v.* Llanidloes, *u. s.*

[2] Van Mining Co. *v.* Llanidloes, *u. s.*

[3] *Ib.*

[4] *Ib.*: see *ante*, pp. 2, 3.

[5] Van Mining Co. *v.* Llanidloes, *u. s.* The law was the same before the Rat. Act, 1874: see *ante*, p. 558, n.

[6] See *ante*, pp. 500, *et seq.*

[7] See Rowls *v.* Gells, 2 Cowp. 451.

[8] S. 13 (as to which, see Van Mining Co. *v.* Llanidloes, *u. s.*) can hardly be applicable. For duties, which include 'cope' (as to which, see *ante*, pp. 511, 512) would not be "wholly reserved in kind."

[9] R. *v.* Jolliffe, 2 T. R. 90.

[10] See *ante*, p. 557, n. 5.

[11] The Act, as to most of its provisions, came into operation on the 6th April, 1875: see s. 11.

mine, was exempt from being rated to in respect of such mine; became payable by him in respect of such mine during the continuance of his lease, grant, or license, or before the arrival of the period at which the amount of the rent, royalty or dues, was liable to revision or readjustment; he might (unless he had specifically contracted to pay such rate in the event of the abolition of the said exemption) deduct from any rent, royalty, or dues, one-half of any such rate paid by him; provided that he should not deduct any sum exceeding what one-half of the rate in the pound of such poor or other local rate would amount to, if calculated upon the rent, royalty, or dues.[1] Any payment so authorized to be deducted is a good discharge for such amount of rent, royalty, or dues, as is equal to the amount of such payment; and it may be recovered as an ordinary debt from the person to whom the rent, royalty, or dues may be payable. And the person receiving the rent, royalty, or dues, has the same right of appeal and objection, as he would have if he were the occupier.[2]

Devonshire *v.* Barrow Co. — Chaloner *v.* Bolckow.

Where a lease of iron mines, executed before the commencement of the Act,[3] contained a covenant by the lessee to pay a certain rent, free of "all rates, taxes, tithe rent-charges, expenses, and deductions whatsoever, parliamentary, parochial, or of any other nature," it was held, that a specific contract was not thereby constituted; so as to disentitle the lessee to deduct one-half of the rate from the rent.[4] And even where such a lease contained covenants by the lessee to pay certain rents and royalties, "free and clear of and from all cesses, taxes, rates, charges, and impositions whatsoever, laid or imposed, or hereafter to be charged, laid or imposed" by parliament or otherwise, and to pay them "free from all deductions whatsoever," and to pay "all manner of taxes, rates, assessments, charges, and impositions whatsoever, parliamentary or parochial, which now are, or which shall at any time or times hereafter during the continuance of this demise be taxed, rated, charged, assessed or imposed," landlord's property-tax excepted; a similar decision was arrived at.[5]

[1] S. 8.
[2] S. 9.
[3] See n. [11] on preceding page.
[4] Devonshire *v.* Barrow Co., 2 Q. B. D. 286.
[5] Chaloner *v.* Bolckow, 3 App. Cas.

d. Place of Liability.

Where a mine lies in several parishes, it is rateable pro- Place of liability.
portionately in each of them; although the adit and machinery may be situate in one only.[1] Where an Inclosure Act enacted, that the allotments to be set out thereunder should be deemed to be situate in a different parish from that in which they would naturally be situate; but that nothing in the Act should affect the owner's right to certain mines; it was held, that the enactment only affected the portion of the soil actually allotted to the commoners, and did not affect the mines; and that the mines remained rateable in the parish in which they were actually situate, as before the Act.[2]

SECT. 5.—TITHES.

Tithes are not payable, of common right, of quarries of Tithes.
stone, gravel, turf, tin, lead, brick, lime, marl, coal, chalk, and such like; these substances being a produce of the earth, and not an annual produce.[3] But ore payable by way of tithe may be due by custom; as in Worselworth, Hartington, and Eyam in Derbyshire,[4] and Stoney Middleton, in the same county;[5] Teasdale Forest, in the county of Durham,[6] and Stanhope in Weardale, in the same county;[7] and Arkilgarthdale, in Yorkshire.[8] Mineral tithes are not within the Tithe Comm. Act, 6 & 7 Will. 4, c. 71.[9] But they may be made the subject of a parochial agreement under the Tithe Comm. Act, 2 & 3 Vict. c. 62.[10]

933. See this case for a statement of the principle of the provision in question.

[1] R. *v.* Foleshill, 2 A. & E. 593; Snailbeach Co. *v.* Forden, 35 L. T. N. S. 514, 517; *ante*, p. 561.

[2] R. *v.* Pitt, 5 B. & Ad. 565.

[3] 2 Inst. 657; Amiles *v.* Chambers, 1 Mod. 35; Stoutfil's Case, 2 Mod. 77; Buxton *v.* Hutchinson, 2 Vern. 46.

[4] *Ante*, p. 518.

[5] *Ib.*

[6] *Ante*, p. 520.

[7] *Ante*, p. 521.

[8] *Ib.*

[9] See s. 90.

[10] See s. 9.

SECT. 6.—PAUPER SETTLEMENTS.

Pauper settlements.

It is doubtful, whether a coal mine is 'land' within the Act 6 Geo. 4, c. 57; so as to enable an occupation of it to confer a settlement.[1] But if it is, it must be rented at £10 a year at the least, for the whole of the year during which it is occupied.[2] A pauper freeholder, entitled to dig turf for his own use, and get stone from a common, is not, therefore, irremoveable from the parish under the Acts 14 Car. 2, c. 12, and 35 Geo. 3, c. 101, s. 1.[3]

[1] See R. *v.* West Ardsley, 4 B. & S. 95.

[2] *Ib.*

[3] R. *v.* Warkworth, 1 M. & S. 473.

CHAPTER XXIV.

EMPLOYERS AND LABOURERS.

PART A.—REGULATION ACTS.

SECT. 1.—GENERALLY.

Generally.

THE internal regulation of mines is governed by the Coal Mines Regulation Act, 1872,[1] and the Metalliferous Mines Regulation Act, 1872;[2] as supplemented and altered by the Acts 38 & 39 Vict. c. 17, s. 59; 38 & 39 Vict. c. 39; 44 & 45 Vict. c. 26; and 45 & 46 Vict. c. 3.

Application of Acts.

The Coal Mines Act applies to mines of coal, mines of stratified ironstone, mines of shale, and mines of fire-clay.[3] The Met. Mines Act applies to mines other than those to which the Coal Mines Act applies.[4] And if any question arises whether a mine is a 'coal' mine, or a 'metalliferous' mine, it is referable to a Secretary of State; whose decision is final.[5] The Met. Mines Act, subject to certain modifications, applies to the Isle of Man.[6] It has been doubted whether the Met. Mines Act applies to Crown mines subject to the Derbyshire custom.[7] But, apparently, this doubt is not well founded.[8]

Statutory meanings of 'mine' and 'shaft.'

In each Act 'mine' includes, *primâ facie*, every shaft in the course of being sunk, and every level and inclined plane in the course of being driven for commencing or opening any mine, or for searching for or proving minerals, and all the shafts, levels, planes, works, machinery, tramways, and sidings, both below

[1] 35 & 36 Vict. c. 76.

[2] 35 & 36 Vict. c. 77.

[3] See s. 3.

[4] See s. 3.

[5] Coal Mines Act, s. 70; Met. Mines Act, s. 39.

[6] See s. 43.

[7] See Arkwright *v.* Evans, 49 L. J. M. C. 82, 87. As to the Derbyshire custom, see *ante*, pp. 500, *et seq.*

[8] Under s. 39 of the Act, and under s. 1 of 38 & 39 Vict. c. 39, Barmasters (as to whom see *ante*, p. 504,) are charged with certain specified duties: see *post*, p. 604.

ground and above ground, in and adjacent to a mine, and any such shaft, level, and inclined plane, and belonging to a mine.[1] However, where two or more parts of a 'coal mine' are worked separately, the 'owner' or 'agent' may give notice to that effect to the inspector;[2] and thereupon each part is deemed to be a separate mine. If, however, the Secretary of State thinks that the division tends to evade the provisions of the Coal Mines Act, he may give notice of objection thereto. If the 'owner' or 'agent' declines to acquiesce in the objection, he may within twenty days give notice to the inspector, that he so declines. And the matter is thereupon determinable by arbitration; the receipt of the last notice being deemed to be the date of the reference.[3] In each Act 'shaft,' *primâ facie*, includes 'pit.'[4] A slate quarry worked by means of underground workings by levels has been held to be a 'mine' within the meaning of the Met. Mines Act.[5]

Statutory meanings of 'owner' and 'agent.'

In each Act 'owner' means, *primâ facie*, any person or body corporate who is the immediate proprietor, or lessee, or occupier; and does not include a person or body corporate who merely receives a royalty, rent, or fine; or is merely the proprietor, subject to any lease, grant, or license for the working; or is merely the owner of the soil, and is not interested in the minerals.[6] And any contractor for the working of a 'coal mine' is subject to the Coal Mines Act as if he were an 'owner;' but not so as to exempt the 'owner' from liability.[7] If there are two or more co-owners, 'owner' includes any of them.[8] Of course the holder of an expired lease is not an 'owner.'[9] And the mere recipient of a rent or royalty does not become an 'owner,' because he is also a lessee.[10] In the Coal Mines Act

[1] Coal Mines Act, s. 72; Met. Mines Act, s. 41.

[2] As to 'inspectors,' see *post*, pp. 574—576.

[3] Coal Mines Act, s. 25. As to arbitrations, see *post*, pp. 600. 601.

[4] S. 72; Met. Mines Act. s. 41.

[5] Sim *v.* Evans, 23 W. R. 730. See *ante*, p. 5. Other quarries are subject to the Factory and Workshop Acts: see *post*, pp. 606, 607.

[6] Coal Mines Act. s. 72: Met. Mines Act, s. 41. The words "and not interested in the minerals," refer to the immediately preceding words, and not to all the three categories included in the exception: see Evans *v.* Mostyn, 2 C. P. D. 547, 552.

[7] Coal Mines Act. s. 72.

[8] R. *v.* Brown, 7 E. & B. 757.

[9] See Stott *v.* Dickinson, 34 L. T. N. S. 291.

[10] Arkwright *v.* Evans, 49 L. J. M. C. 82.

'agent' means, *primâ facie*, any person having on behalf of the 'owner' care or direction of a 'mine,' or any part thereof, and superior to a 'manager.' In the Met. Mines Act 'agent' means, *primâ facie*, any person having on behalf of the 'owner' care or direction of a mine, or any part thereof.[1]

All notices under either Act may be served by post by a prepaid letter; and, in proving service, it is sufficient to prove, that the letter was properly addressed and posted.[2] Notices.

SECT. 2.—SUMMARY PROCEEDINGS—OFFENCES, PENALTIES, AND PUNISHMENTS.

(a) *Summary Proceedings.*

In each Act the term 'Court of Summary Jurisdiction' means:[3]—In England and Ireland, any justice or justices of the peace, metropolitan police magistrate, stipendiary or other magistrate or officer to whom jurisdiction is given by the Summary Jurisdiction Acts,[4] or any Acts therein referred to; and in Scotland, any justice or justices of the peace, sheriff or other magistrate, to the proceedings before whom the provisions of the Summary Jurisdiction Acts[5] may be applied.[6] The Court of Summary Jurisdiction, when hearing and determining an information or complaint under either Act, is required to be constituted: in England, either of two or more justices of the peace in petty sessions, or of some single magistrate or officer having equivalent powers: in Scotland, of two or more justices of the peace, or of the sheriff or some other single magistrate or officer having equivalent powers; and in Ireland (within the police district of Dublin), of one of the divisional justices of that Court of Summary Jurisdiction.

[1] Coal Mines Act, s. 72; Met. Mines Act, s. 41.

[2] Coal Mines Act, s. 71; Met. Mines Act, s. 40.

[3] Coal Mines Act, s. 72; Met. Mines Act, s. 41.

[4] *I.e.*, in England, 11 & 12 Vict. c. 43, and any amending Acts; and in Ireland (within the police district of Dublin), the Acts regulating the powers and duties of justices of the peace for, or of the police of, such district, and (elsewhere) the Petty Sessions (Ireland) Act, 1851, and any amending Act: see *ib.*

[5] *I.e.*, The Summary Proc. Act, 1864: see *ib.*

[6] See further, as to the application of the Acts to Scotland, Coal Mines Act, ss. 65, 73; Met. Mines Act, ss. 36, 42.

district, and (elsewhere), of two or more justices of the peace in petty sessions. And, in every case, the Court must sit at the properly appointed place.[1] An 'owner,' 'agent,' or manager of a 'coal mine,' or his father, son, or brother, cannot act as a Court or member of a Court of Summary Jurisdiction in respect of an offence under the Coal Mines Act.[2]

(β) *Offences, Penalties, and Punishments.*

Generally.

Every person employed in or about a 'mine' other than an 'owner,' 'agent,' or manager,[3] who is guilty of any act or omission, which in the case of an 'owner,' 'agent,' or manager, would be an offence against the Act in question, is guilty of an offence. Every person guilty of an offence is liable to a penalty, if he is an 'owner,' 'agent,' or manager, of £20; and, if he is any other person, of £2; for each offence. And, if the inspector has given written notice of any such offence, he is liable to a further penalty of £1 for every subsequent day that such offence continues.[4]

Proceedings for offences and penalties.

All offences under the Coal Mines Act not declared to be misdemeanours,[5] and all offences under the Met. Mines Act, and all penalties under either Act, and all money and costs by either Act directed to be recovered as penalties, may be prosecuted and recovered before a Court of Summary Jurisdiction.[6] Any complaint or information under either Act must be made or laid within three months.[7] The description of any offence in the words of the Act is sufficient. Any exception, exemption, proviso, excuse, or qualification, may be proved by the defendant; but it need not, even if specified or negatived in the information, be

[1] Coal Mines Act, s. 62; Met. Mines Act, s. 33. See, as to procedure in Scotland, Dykes *v.* Merry, 7 Sess. Cas. (3rd ser.) 603; Nimmo *v.* Clark, 10 *ib.* 477: decisions under the rep. Act, 23 & 24 Vict. c. 151.

[2] Coal Mines Act, s. 67.

[3] 'Managers' only exist in the case of mines governed by the Coal Mines Act: *post*, p. 576.

[4] Coal Mines Act, s. 60; Met. Mines Act, s. 31.

[5] See *post*, pp. 578, 579.

[6] Coal Mines Act, s. 62; Met. Mines Act, s. 33.

[7] The repealed Act. 18 & 19 Vict. c. 108, provided that "all penalties may be recovered within three months;" which apparently applied not to the commencement of the proceedings, but to the time of the judgment: see R. *v.* Mainwaring, E. B. & E. 474.

proved by the informant. An 'owner,' 'agent' or manager may, if he thinks fit, be sworn and examined, where he is charged in respect of any non-observance by another person. And the Court must, if required by either party, cause minutes of the evidence to be taken and preserved.[1] The Court must not impose a penalty under the Coal Mines Act exceeding £50. But that or any less penalty may be imposed for any one offence, notwithstanding that the offence involves a higher penalty.[2]

Imprisonment.

An 'owner,' 'agent,' or manager, or a person employed, who is guilty of an offence, which was reasonably calculated to endanger the persons employed, or to cause them serious personal injury, or to cause a dangerous accident, and was committed wilfully by the personal act, personal default, or personal negligence of the person accused, may, if the Court thinks a pecuniary penalty inadequate, be imprisoned with or without hard labour, for a period not exceeding three months.[3]

Appeals.

A person may appeal from a sentence of imprisonment, or from the imposition of a penalty amounting to or exceeding half the maximum penalty, to the next Court of General or Quarter Sessions holden not less than twenty-one days afterwards. The appellant must within seven days give notice to the other party and to the Court below of his intention to appeal, and of the ground thereof. And he must, immediately after the notice, give security before a justice of the peace to try the appeal, and to abide the judgment of the Court, and to pay such costs as may be awarded. But the justice may, if he thinks fit, thereupon release him from custody. The Court of appeal may adjourn the appeal; and it may confirm, reverse, or modify the decision below, or remit the matter to the Court below, or make such other order as it thinks just; and it may make such order as to costs as it thinks just.[4]

Prosecutions.

No prosecution can be instituted against an 'owner,' 'agent,' or manager for any offence which can be prosecuted before a

[1] Coal Mines Act, s. 63; Met. Mines Act, s. 34.

[2] See s. 63.

[3] Coal Mines Act, s. 61; Met. Mines Act, s. 32.

[4] *Ib.* These provisions are subject to certain qualifications with respect to Scotland: see the sections in question.

Court of Summary Jurisdiction, except by an inspector, or with the consent in writing of the Secretary of State. And, in the case of any offence of which the 'owner,' 'agent,' or manager is not guilty, if he proves that he had taken all reasonable means to prevent its commission, an inspector must not institute a prosecution, if satisfied that such means had been taken.[1]

Same offence not twice punishable.

No person can be punished twice for the same offence. But subject to this, any person may be indicted or liable under any other Act or otherwise to another or higher penalty or punishment. And if the Court before whom a person is charged thinks, that proceedings ought to be taken under any other Act or otherwise, the case may be adjourned for that purpose.[2]

Application of penalties.

Where a penalty is imposed for neglecting to notify an explosion or accident,[3] or for any offence which has occasioned loss of life or personal injury, the Secretary of State may direct the penalty to be paid to the persons injured, and the relatives of those whose death may have been caused, or some of them. But such persons must not have occasioned the explosion or accident, or committed the offence, or contributed to do so. And the fact of such payment must not affect any proceeding relative to such explosion, accident, or offence. Subject as above, all penalties must be paid into the receipt of the Exchequer, and carried to the Consolidated Fund. In Ireland all penalties must be applied as directed by the Fines Act (Ireland), 1851, and any amending Act.[4]

Sect. 3.—INSPECTORS—CERTIFICATED MANAGERS.

(*a*) *Inspectors.*[5]

Appointment, removal and qualifications.

Inspectors are appointed and removed by the Secretary of State; who assigns them their duties, and awards them

[1] Coal Mines Act, s. 64; Met. Mines Act, s. 35.

[2] Coal Mines Act, s. 66; Met. Mines Act, s. 37.

[3] See *post*, pp. 601, 602.

[4] Coal Mines Act, s 68; Met. Mines Act, s. 38.

[5] As to inspectors acting as such at the commencement of the Acts, see Coal Mines Act, s. 74; Met. Mines Act, s. 44.

such salaries as the Commissioners of the Treasury approve.[1] Inspectors appointed under either Act may, if directed by the Secretary of State, act under the other.[2] Land agents and mining engineers; and managers, viewers, 'agents' and valuers of 'mines;' and arbitrators in differences between 'owners,' 'agents,' and managers of 'mines;' and the partners of such persons; and persons otherwise employed in 'mines;' are disqualified from acting as inspectors.[3]

Powers—generally.

Inspectors are empowered to make all necessary inquiries for ascertaining whether the provisions of the Acts are complied with; to enter, inspect, and examine any 'mine' at all reasonable times by day and night, but not so as to impede or obstruct the working; to make inquiry respecting the condition of any 'mine,' and the ventilation thereof, and the sufficiency of the special[4] rules for the time being in force therein, and the safety of the persons employed therein, or in any contiguous 'mine;' and to exercise such other powers as may be necessary for carrying the Acts into effect. And persons who wilfully obstruct inspectors; and 'owners,' 'agents,' and managers who refuse or neglect to furnish to inspectors the means necessary for exercising their powers; are guilty of offences against the Acts.[5]

Plans.

The 'owner,' 'agent,' or manager[6] must keep in the office at the mine; or (in the case of 'metalliferous mines') in the principal office of the mines belonging to the same 'owner' in the district; an accurate plan[7] of the workings. And such plan must show (in the case of 'coal mines') the workings up to six months previously; and (in the case of 'metalliferous mines') the workings up to six months previously other than workings last discontinued more than twelve months before the commencement of the Met. Mines Act.[8] And the 'owner,'

[1] Coal Mines Act, s. 43; Met. Mines Act, s. 15. Notice of the appointment must be published in the London Gazette: *ib.*

[2] See *ib.*

[3] Coal Mines Act, s. 44; Met. Mines Act, s. 16.

[4] See *post*, pp. 592—595.

[5] Coal Mines Act, s. 45; Met. Mines Act, s. 17.

[6] There are no certificated managers in 'metalliferous mines.'

[7] 'Plan' includes a map and section, and a correct copy or tracing of any original plan: Coal Mines Act, s. 72; Met. Mines Act, s. 41.

[8] 1st Jan., 1873: see s. 2.

'agent,' or manager must produce the plan to an inspector at the office; and, if requested, mark the progress of the workings up to the time of production; and must allow the inspector to examine it. Non-observance of these provisions is an offence against the Act in question. And, in addition, the inspector may (whether a penalty has or has not been inflicted) require an accurate plan to be made within a reasonable time at the expense of the 'owner;' and non-compliance with the requisition is also an offence against the Act. But these provisions only apply, in the case of 'metalliferous mines,' to those in which more than twelve persons are ordinarily employed below ground.[1]

(β) *Certificated Managers.*[2]

Appointment of managers.

Every 'coal mine' is required to be under the control and daily supervision of a manager. And the 'owner' or 'agent' is obliged to nominate himself or some other person (not being a contractor for getting the mineral, or a person in his employment) to be the manager; and to notify to the district inspector his name and address. To be qualified, a manager must be registered as the holder of a certificate. If any 'coal mine' is worked for more than fourteen days without a qualified manager, the 'owner' and 'agent' are each liable to a penalty of £50; and to a further penalty of £10 for every day during which the mine is so worked. But the 'owner' will be free from liability, if he proves that he had taken all reasonable means to comply with the above provisions. And, if, for any reasonable cause, there is for the time being no qualified manager, the 'owner' or 'agent' may appoint any competent person to be a temporary manager; notifying his name and address, and the reason of his appointment, to the district inspector. And a mine in which less than thirty persons are ordinarily employed below ground, or of which the average daily put-out does not exceed twenty-five tons, is exempt from the above provisions, unless the district inspector otherwise directs.[3]

[1] Coal Mines Act, s. 47; Met. Mines Act, s. 19.

[2] There are no certificated managers in 'metalliferous mines.'

[3] Coal Mines Act, s. 26.

Examiners exist for the purpose of granting certificates of competency to managers; and Boards exist for the purpose of appointing the examiners. The members of a Board are themselves appointed and removed by the Secretary of State. And they consist of three 'owners' of 'coal mines;' three persons employed in or about a 'coal mine,' not being 'owners,' 'agents,' or managers; three mining engineers, 'agents,' managers, or coal viewers; and one inspector under the Coal Mines Act.[1] The proceedings of a Board are in accordance with specified rules.[2] Examiners cannot be members of a Board except with the consent of the Secretary of State. A Board may make, alter, and revoke rules as to the conduct of the examinations, and the qualifications of the applicants; but in every examination regard must be had to such knowledge as is necessary for the practical working of mines.[3] The Secretary of State may make, alter, and revoke rules as to the places and times of examinations; the number and remuneration of the examiners; and the fees (which are not to exceed £2) to be paid by the applicants.[4] The Secretary of State delivers a certificate of competency to every successful applicant; and a register of the holders of certificates is kept under his direction.[5] A copy may, in case of loss, be obtained on payment of a fee of five shillings.[6]

Examiners and Boards.

The Secretary of State may at any time institute a public inquiry into the competency of a manager. He appoints a county court judge, metropolitan police magistrate, stipendiary magistrate, or other person or persons, either alone, or with an assessor or assessors, to conduct the inquiry; and he appoints a person to conduct the case.[7] And he may pay to the members of the Court, including the assessors, such remuneration as, with the consent of the Treasury, he appoints.[8] But he is bound, before the inquiry commences, to furnish a statement of the case to the manager. The manager may attend by

Inquiry into competency.

[1] S. 27.

[2] See sch. 2 to the Act.

[3] S. 28.

[4] S. 29; sch. 1.

[5] S. 30. Managers, existing as such at the passing of the Act, were also entitled to grants of certificates of service, having the same effect as certificates of competency: see s. 31.

[6] S. 35; sch. 1. As to reports, see *post*, p. 605.

[7] S. 32.

[8] S. 33.

himself, his counsel, solicitor, or agent; and he may, if he thinks fit, be sworn and examined as an ordinary witness.[1] The Court of inquiry has all the powers both of a Court of Summary Jurisdiction, and of an inspector. The Court may also by summons require the attendance of witnesses; who are entitled to such expenses as would be allowed to witnesses attending on subpœna before a Court of Record; and, in case of dispute as to the amount, to such expenses as may be certified by a master of the High Court. The Court may cancel or suspend the certificate. And it may require a manager, under pain of forfeiting of £100, to deliver it up; and may hold it until the conclusion of the inquiry; and may then restore, cancel, or suspend it.[2] The Court may also make such order respecting the costs and expenses of the inquiry as it thinks fit; and such order is enforceable by any Court of Summary Jurisdiction.[3]

Record of cancellation—restoration.

A cancellation or suspension must be recorded in the register of holders of certificates; but a certificate may be restored by the Secretary of State, if it is shown to him to be just to do so.[4]

Expenses of Secretary of State—fees.

All costs and expenses ordered by the Court of inquiry to be paid by the Secretary of State, and all remunerations payable to members of the Court, and all expenses incurred by the Secretary of State with respect to certificates, are payable out of moneys provided by Parliament.[5] All fees payable by applicants for examination for, or for a copy of, a certificate must be paid into the receipt of the Exchequer, and carried to the Consolidated Fund.[6]

Misdemeanours.

Any person who (1) forges, or counterfeits, or knowingly makes any false statement in any certificate of competency, or any official copy of such certificate; or (2) knowingly utters or uses any such certificate or copy which has been forged or counterfeited or contains any false statement; or (3) for the purpose of obtaining, for himself or any other person, employment as a certificated manager, or the grant, renewal, or restoration of any certificate, or a copy thereof, either (*a*) makes

[1] S. 32.
[2] *Ib.*
[3] S. 33. As to reports, see *post*, p. 605.
[4] S. 34.
[5] Ss. 33. 36.
[6] S. 36.

or gives any declaration, representation, statement, or evidence, which is false in any particular, or (*b*) knowingly utters, produces, or makes use of any such declaration, representation, statement, or evidence, or any document containing the same; is guilty of a misdemeanour; and is liable, on conviction, to imprisonment for a term not exceeding two years, with or without hard labour.[1]

SECT. 4.—EMPLOYMENT OF WOMEN, YOUNG PERSONS, AND CHILDREN.

(*a*) *Generally.*

Offences as to employment.

Non-observance by any person of the provisions as to employment is an offence against the Act in question. And the 'owner,' 'agent,' and manager, or the 'owner' and 'agent' (as the case may be), are also each guilty of an offence, unless he proves that he had taken all reasonable means to prevent the non-observance. If, however, it appears that any non-observance was induced by a misrepresentation as to age by a parent or guardian, no such offence will have been committed. But, in that case, the parent or guardian will be guilty of an offence.[2]

Statutory meanings of 'child,' 'young person,' and 'woman.'

In the Coal Mines Act 'child' means a child under the age of thirteen years; 'young person' a person of the age of thirteen, and under the age of sixteen years; and 'woman' a female of the age of sixteen years and upwards.[3]

(*β*) *Below and Above Ground—Schools.*

Prohibitions and restrictions as to employment below ground.

No boy under the age of ten years, and no woman or girl of any age, can be employed below ground in any 'coal mine.'[4] And no boy under the age of twelve years can be employed below ground in any 'coal mine,' except one in which the Secretary of State, by reason of the thinness of the seams, considers it necessary, and authorizes it: nor, in such a case, for more than six days in a week; or, if he is employed for more

[1] S. 37.
[2] S. 15; Met. Mines Act, s. 8.
[3] See s. 72.
[4] See s. 4.

than three days in a week, for more than six hours in a day; or, in any other case, for more than ten hours in a day.[1] No boy under the age of twelve years, and no woman or girl of any age, can be employed below ground in any 'metalliferous mine.'[2] And no boy under the age of thirteen years, and no male young person under the age of sixteen years, can be employed below ground in any mine governed by either Act for more than fifty-four hours in a week, or ten hours in a day.[3] And, in the case of mines governed by either Act, an interval of eight hours must be allowed between the period of employment of boys and male 'young persons' on Friday and the period of their employment on the following Saturday, and in other cases of twelve hours between each period; the period beginning at the time of leaving, and ending at the time of returning to, the surface. However, in the case of boys and male 'young persons,' whose employment in a 'metalliferous mine' is at such a distance from their ordinary place of residence that they do not return there during the intervals of labour, and who are not employed during more than forty hours in any week, an interval of eight hours is allowed between each period.[4]

Schools.

Every boy under the age of twelve years, employed below ground in any 'coal mine,' must attend school for twenty hours in every two weeks during his employment;[5] unless either prevented by sickness, or during holidays, or for some other unavoidable or temporary cause; or unless there is no school within two miles. His immediate employer, who has employed him for any time amounting in the whole to not less than fourteen days, must moreover obtain on Monday in every week from the principal teacher a certificate of the attendance during the preceding week; and (where he is not himself such) he must deliver the certificate to the 'owner,' 'agent,' or manager. And the 'owner,' 'agent,' or manager must obtain the delivery of the certificate, and keep it for six months in the office at the

[1] S. 5.

[2] Met. Mines Act, s. 4.

[3] Coal Mines Act, s. 6; Met. Mines Act, s. 5.

[4] Coal Mines Act, s. 7; Met. Mines Act, s. 5.

[5] Coal Mines Act, s. 8. See further, as to computing the time of attendance, *ib.*

mine; and produce it to an inspector when required; and allow him to inspect and copy it. And any person who forges or counterfeits, or falsely gives or signs, a certificate; or wilfully makes use of any forged, counterfeit, or false certificate; is liable, on conviction, to imprisonment for a period not exceeding three months, with or without hard labour.[1] On the application of the principal teacher the employer must pay, for every week that the boy attends, a sum not exceeding twopence, and not exceeding one twelfth part of the boys' wages; and he may then deduct the amount from the wages. An employer, who refuses to pay, is liable to a penalty of ten shillings.[2] An inspector may disqualify from granting certificates any teacher whom he considers unfit. But he must serve on such teacher, and (so far as he can) on any employer who obtains certificates from him, a written notice, stating the reason; and (in the notice to the employer) specifying a school within two miles which the boy employed can attend. And the teacher and employer may, within three weeks, appeal to the Education Department, who may confirm or reverse the disqualification.[3] The parent or guardian of a boy required to attend school must secure the attendance. And, on wilfully failing to do so, he is liable to a penalty of £1 for each offence.[4]

Duty as to reports.

Before the immediate employer of any boy or male 'young person' of the specified age, other than the 'owner,' 'agent,' or manager, employs him below ground, he must report to the 'owner,' 'agent,' or manager, or some person appointed by him, that he is about to do so.[5]

Restrictions as to employment above ground.

The employment above ground of 'women,' 'young persons,' and 'children,' in connection with any 'coal mine' is subject to the following restrictions:—No child under the age of ten years can be employed. The regulations of the Coal Mines Act with respect to boys under twelve years of age apply to every 'child' employed. The regulations of the Act with respect to male 'young persons' under the age of sixteen years apply to every 'woman' and 'young person' employed. No 'woman,' 'young

[1] Coal Mines Act, s. 8.
[2] S. 9.
[3] S. 10.
[4] S. 11.
[5] S. 13; Met. Mines Act, s. 6. See further, as to schools, 39 & 40 Vict. c. 79, s. 7; and (Scotland) 41 & 42 Vict. c. 78, s. 10.

person,' or 'child' can be employed between nine o'clock at night and five o'clock on the following morning, or on Sunday; or (except in the case of any mine in Ireland exempted by the Secretary of State) after two o'clock on Saturday afternoon. And specified intervals for meals must be allowed to every such 'woman,' 'young person,' and 'child.'[1]

Register.

The 'owner,' 'agent,' or manager of every mine governed by either Act must keep a register in the office at the mine; or (in the case of 'metalliferous mines') in the principal office of the mine belonging to the same 'owner' in the district. And he must enter in such register the name, age, residence, and date of first employment, of all boys and male 'young persons' employed below ground; and of all 'women,' 'young persons,' and 'children' employed above ground; and (in the case of a 'coal mine') a memorandum of the certificates of the school attendances of boys. And he must produce such register to an inspector when required, and allow him to inspect and copy it.[2]

(γ) *Drivers of Engines, &c.*

Drivers of engines, &c.

Where there is a 'shaft,' or an inclined plane or level, in any mine, governed by either Act, up or down or along which persons are taken by any engine, windlass, or gin, no person can have charge thereof, unless he is a male of eighteen years of age.[3] But to make a contractor for working a mine liable to a conviction for allowing females to have charge, contrary to this provision, knowledge of or acquiescence in their being so employed must be brought home to him. And evidence, that females were found in charge on one occasion only, is not sufficient to make him liable.[4] Where the engine, windlass, or gin is worked by an animal, the person under whose direction the driver acts is deemed to be the person in charge; but such driver must not be under twelve years of age.[5]

[1] Coal Mines Act, s. 12. As to pit-banks, see 41 Vict. c. 16. sch. 4, part 2; *post*. p. 607.

[2] Coal Mines Act, s. 13; Met. Mines Act, s. 6.

[3] Coal Mines Act, s. 14; Met. Mines Act, s. 7.

[4] See R. *v.* Handley, 9 L. T. N. S. 827; a decision on the repealed Act, 5 & 6 Vict. c. 99 (ss. 8. 13).

[5] Coal Mines Act, s. 14; Met. Mines Act, s. 7.

Sect. 5.—WAGES—DRESSING ACCOMMODATION.

(*a*) *Wages.*

Place of payment.

No wages are allowed to be paid to any person employed in any mine governed by either Act at any public house, beer shop, or place for the sale of spirits, beer, wine, cyder, or other spirituous or fermented liquor; or other house of entertainment; or any office, garden, or place belonging or contiguous thereto, or occupied therewith.[1]

Payment by weight.

Where the wages paid to any persons employed in a 'coal mine' depend on the minerals gotten, such persons must be paid according to weight; and the minerals must be weighed accordingly. This, however, does not preclude agreements between the 'owner,' 'agent,' or manager, and such persons to allow deductions in respect of stones, or other materials, which may be sent out of the mine with the minerals in question; or in respect of tubs or baskets improperly filled; the deductions being determinable by the banksman or weigher or 'check weigher' (if any); or, in case of difference, by a third party to be mutually agreed on. And the Secretary of State may by order exempt any mine or class of mines from the provisions as to payment by weight, either without condition or during the time and upon the conditions specified in the order; or postpone the beginning of such payment; and may revoke or alter any such order.[2] And the persons employed may thereupon be paid by measure or gauge instead of by weight.[3]

Offences as to wages.

Non-observance by any person of the foregoing provisions is an offence against the Act in question. And the 'owner,' 'agent,' and manager, or the 'owner' and 'agent' (as the case may be), are each also guilty of an offence, unless he proves that he had taken all reasonable means to prevent such non-observance.[4]

Check weigher.

The persons employed in a 'coal mine,' who are paid by weight, measure, or gauge, may at their own cost station a

[1] Coal Mines Act, s. 16; Met. Mines Act, s. 9.

[2] Coal Mines Act, s. 17.

[3] See s. 18.

[4] Ss. 16, 17; Met. Mines Act, s. 9.

'check weigher' at the place appointed for the weighing, measuring, or gauging, to take an account. The check weigher must be one of the persons employed either in the mine in question, or in another mine belonging to the 'owner.' He must not impede or interrupt the working; and he must not interfere with the weighing, measuring, or gauging; and his absence is no reason for interrupting or delaying it. But he must be afforded every facility for taking an account. And if proper facilities are not afforded, the 'owner,' 'agent,' and manager are each guilty of an offence against the Coal Mines Act, unless he proves that he had taken all reasonable means to afford them. If the 'owner,' 'agent,' or manager desires the removal of a check weigher, he may complain to any Court of Summary Jurisdiction;[1] which, if of opinion that sufficient *primâ facie* ground has been shown, must call upon the check weigher to show cause against his removal. And at the hearing the Court may make a summary order for his removal (but without prejudice to the stationing of another check weigher in his place); and may make such order as to costs as it thinks just.[2] For the purpose of obtaining a summary order it is not necessary to show actual interruption to the working. The order may be obtained in such a case as that of intimidating workmen with a view of compelling them to cease working.[3] A check weigher ceases to be such, if and so soon as the miners who appointed him are dismissed, and the mine closed. And, although the same miners be immediately re-engaged, he is not thereby reinstated.[4]

Weights and Meas. Act.

The Weights and Meas. Act, 1878,[5] applies to the weights used in any 'coal mine' for determining wages by weight. And the district inspector of weights and measures must accordingly from time to time, but without unnecessarily impeding or interrupting the working of the mine, inspect and examine the weighing machines and weights used in, or the measures or gauges used for, any 'coal mine.' But this provision does not prevent the use of the measures or gauges ordinarily used.[6]

[1] *Ante*, p. 571.

[2] Coal Mines Act, s. 18: see also s. 62.

[3] Prentice *v.* Hall, 26 W. R. 237.

[4] Whitehead *v.* Holdsworth, 4 Exch. D. 13.

[5] 41 & 42 Vict. c. 49.

[6] Coal Mines Act, s. 19.

(β) *Dressing Accommodation.*

Dressing accommodation.

In a 'metalliferous mine,' in which more than twelve persons are ordinarily employed below ground, sufficient accommodation must be provided above ground near the principal entrance of the mine, and not in the engine house or boiler house, to enable them to conveniently dry and change their dresses.[1]

SECT. 6.—PROVISIONS AGAINST ACCIDENTS [2]

a. General Rules.[3]

(a) *Generally.*

Offences as to General Rules.

Non-observance of the general rules is an offence against the Act in question. And in the event of any non-observance by any person being proved, the 'owner,' 'agent,' and manager, or the 'owner' and 'agent' (as the case may be), are each guilty of an offence against the Act, unless he proves that he had taken all reasonable means, by publishing and enforcing the rules, to prevent such non-observance.[4] Under this provision separate proceedings may be had against any one of two or more co-owners.[5] And the agent of a 'coal mine' may be convicted thereunder, although the mine is under the control of a duly certified manager.[6] And it has been held, that a certified manager might have been convicted, who might with the resources at his command have improved the condition of the mine; although to place it in a perfectly proper condition would have entailed an outlay of £200, and his own salary was only £1 a week.[7] And a working miner may be convicted thereunder as well as an owner or agent.[8] An information was,

[1] Met. Mines Act, s. 23 (16).

[2] For the punishment of conduct calculated to cause accidents, see *ante*, p. 573.

[3] So called in the Acts.

[4] Coal Mines Act, s. 51; Met. Mines Act, s. 23. See also Coal Mines Act, s. 51 (28). As to publishing, see *post*, pp. 605, 606.

[5] See R. *v.* Brown, 7 E. & B. 757; a decision under the repealed Act, 18 & 19 Vict. c. 108, ss. 4, 11.

[6] Wynne *v.* Forrester, 5 C. P. D. 361. Cf. the repealed Act, 23 & 24 Vict. c. 151, ss. 10, 22, and the decision thereon of Dickenson *v.* Fletcher, L. R. 9 C. P. 1.

[7] Hall *v.* Hopwood, 49 L. J. M. C. 17.

[8] Frecheville *v.* Souden, 48 L. T. 612.

under this provision preferred against a part owner of a 'coal mine.' It was proved, that the general rules were put up in various parts of the mine; that the defendant occasionally visited the mine, but resided at a distance, and took no part in the management; and that the management was under the exclusive control of the certified manager, who was also a part owner. The defendant was not examined as a witness, as he might have been;[1] but it was admitted that he had not personally taken any means to enforce the rules. The justices dismissed the information. It was held, that there was evidence from which they might properly have done so.[2]

Books.

The books mentioned in the general rules applicable to 'coal mines,' or a copy, must be kept at the office at the mine; and any inspector, and any person employed, may at all reasonable times inspect, and take copies of and extracts from, any such books.[3]

Inspection of 'coal mines' on behalf of workmen.

The persons employed in a 'coal mine' may appoint two of their number to inspect it at their own cost. And the persons so appointed may once a month go to every part, and inspect the 'shafts,' levels, planes, working places, return airways, ventilating apparatus, old workings, and machinery; and they must be afforded every facility for such purpose. They must report the result, and record the report in a specified book, and sign it.[4]

(β) *Fencings—Shafts, Roads, and Working Places—Machinery.*

Fencings—shafts—roads and working places.

All entrances to places in 'coal mines' not in actual course of working and extension must be fenced across their whole width.[5] And the top of every 'shaft' in a 'coal mine,' and of almost every 'shaft' in a 'metalliferous mine,' which is out of use, or used only as an air shaft, must be fenced. And the top and all entrances between the top and bottom of every working or pumping 'shaft' in a mine governed by either Act, must be fenced; but the fence may be temporarily removed for repairs

[1] Under s. 63, sub-s. 4: see *ante*. p. 573.
[2] Baker *v.* Carter, 3 Exch. D. 132.
[3] Coal Mines Act. s. 51 (31).
[4] S. 51 (30).
[5] S. 51 (4).

or other operations, if proper precautions are used.[1] Where the natural strata are not safe, every working or pumping 'shaft' in a mine governed by either Act must be securely cased, lined, or otherwise made secure.[2] And where one portion of a shaft in a 'metalliferous mine' is used for the ascent and descent of persons, and another portion for raising the material gotten, the first portion must be cased or otherwise securely fenced off from the last.[3] And the roofs and sides of every travelling road and working place in a 'coal mine' must be made secure; and, if not secured, persons are not allowed to travel or work therein, unless appointed to explore or repair.[4]

Use of different shafts—engine-man—guides and signalling.

Where, in a 'coal mine,' there are a downcast and a furnace 'shaft,' and both have apparatus for raising and lowering persons, every person employed is entitled, on giving notice, to use the downcast 'shaft.'[5] In any 'coal mine,' which is usually entered by machinery, a proper engineman must attend to work the lowering and raising machinery during the whole time that any person is below ground.[6] Every working 'shaft' in a 'coal mine' used to draw minerals, or in a mine governed by either Act used to lower or raise persons, must, if exceeding fifty yards in depth, and not exempted by the district inspector, have guides and proper means of signalling from and to the bottom, and every entrance in work between the surface and the bottom, to and from the surface.[7]

Cover overhead—chains—flanges or horns—breaks and indicators—ladders.

A sufficient cover overhead must be used in lowering or raising persons in a working 'shaft,' except where it is worked by a windlass, or the person is employed about the pump or repairs, or the district inspector gives exemption.[8] And for a breach of this provision a working miner may be convicted as well as an owner or agent.[9] Single-linked chains are not allowed except for the short coupling chain attached to the cage or load. Flanges or horns, and other appliances must be used on drums,

[1] S. 51 (13), (14); Met. Mines Act. s. 23 (6), (7).

[2] Coal Mines Act, s. 51 (15); Met. Mines Act. s. 23 (8).

[3] Met. Mines Act, s. 23 (9).

[4] Coal Mines Act, s. 51 (16). As to the fencing of abandoned mines, see *post*, pp. 598—600.

[5] Coal Mines Act, s. 51 (17).

[6] S. 51 (18).

[7] S. 51 (19); Met. Mines Act, s. 23 (10).

[8] Coal Mines Act, s. 51 (20); Met. Mines Act. s. 23 (11).

[9] Freeheville *v.* Souden, 48 L. T. 612.

to prevent the rope from slipping. Breaks, and indicators, to show to the person in charge the position of the cage or load, must be attached to every machine worked by steam, water, or mechanical power.[1] A ladder permanently used for ascent or descent in a 'metalliferous mine' must not be fixed in a vertical or overhanging position, and must be inclined at the most convenient angle, and must have substantial platforms at intervals of not more than twenty yards.[2]

Fencings—machinery—gauges and safety valve—wilful damage, &c.

Fly-wheels, and exposed and dangerous parts of machinery, used in mines governed by either Act, must be securely fenced.[3] Every steam boiler must have a proper steam gauge and water gauge, and a proper safety valve.[4] No person must wilfully damage; or, without proper authority, remove or render useless; any appliance or thing provided in any mine in compliance with either Act.[5]

Daily inspection of 'coal mine.'

In the case of 'coal mines' a competent person must examine once in every twenty-four hours the external parts of the machinery, and the head gear, working places, levels, planes, ropes, chains, and other works; and once in every week the 'shafts' by which persons ascend or descend, and the guides or conductors therein; and report the result. And he must record the report in a specified book, and sign it.[6]

(γ) *Gases and Explosions—Water—Stations and Refuges.*

Gases—ventilation.

An adequate amount of ventilation must be constantly produced in every 'mine,' to such an extent (in the case of 'coal mines,' by diluting and rendering harmless noxious gases), that the 'shafts,' levels, stables, and working places, and the travelling roads to and from such working places, may be fit for working and passing.[7] To comply with this provision ventilation must be produced even during the temporary suspensions of actual

[1] Coal Mines Act, s. 51 (21), (22), (23); Met. Mines Act, s. 23 (12), (13), (14). See the Sc. decision under the repealed Act, 23 & 24 Vict. c. 151, of Nimmo v. Clark, 10 Sess. Cas. (3rd ser.) 477.

[2] Met. Mines Act, s. 23 (15).

[3] Coal Mines Act, s. 51 (24); Met. Mines Act, s. 23 (17).

[4] Coal Mines Act, s. 51 (25); Met. Mines Act, s. 23 (18).

[5] Coal Mines Act, s. 51 (27); Met. Mines Act, s. 23 (19).

[6] Coal Mines Act, s. 51 (29).

[7] Coal Mines Act, s. 51 (1); Met. Mines Act, s. 23 (1).

work, as on Sundays.[1] And it is not a sufficient compliance to cause ventilation to pass along the working places and travelling roads. So much of the mine must be kept so ventilated as to render the working places and travelling roads safe.[2]

Inflammable gas—reports.

In every 'coal mine,' in which inflammable gas has been found within the preceding twelve months, a competent person must, once in every twenty-four hours, if one shift of workmen is employed, and once in every twelve hours, if two shifts are employed, before the time for commencing work in any part, inspect such part, and the roadways leading thereto with a safety-lamp; and make a report of their condition as to ventilation. And in every 'coal mine,' in which inflammable gas has not been so found, a competent person must, once in every twenty-four hours, so far as practicable, immediately before the time for commencing work in any part, inspect such part, and the roadways leading thereto; and make a like report. In each case workmen are prohibited from working, until the parts in question, and the roads leading thereto, are stated to be safe; and in each case the report must be recorded without delay in a specified book, and signed by the person making it.[3]

Safety lamps—barometers and thermometers.

In every working approaching any place in a 'coal mine,' where there is likely to be an accumulation of explosive gas, no lamp or light other than a locked safety-lamp is allowed. And, where a safety-lamp is required, a competent person must examine it immediately before it is taken into the workings, and ascertain it to be secure, and securely locked. And, in the dangerous place in question, it must not be used without such examination, and must not be unlocked without due authority; nor is any person, unless he is appointed for the purpose, allowed to have in his possession any key or contrivance for opening the lock, or any lucifer match or apparatus for striking a light.[4] After dangerous gas has been found in any 'coal

[1] See, upon the repealed Act, 18 & 19 Vict. c. 108, ss. 4, 11, Knowles *v.* Dickinson, 2 E. & E. 705.

[2] See, upon the repealed Act, 23 & 24 Vict. c. 151, s. 10, r. 1, Brough *v.* Homfray, L. R. 3 Q. B. 771 : 9 B. & S. 492.

[3] Coal Mines Act, s. 51 (2), (3).

[4] S. 51 (7).

mine,' a barometer and thermometer must be placed above ground in a conspicuous position near the entrance.[1]

Restrictions as to explosive or inflammable substances.

The use in the underground part of any 'mine' governed by either Act of gunpowder or other explosive or inflammable substance is only allowed under the following conditions:—It must not be stored in the 'mine.' It must not be taken into the 'mine,' except in a case or canister containing not more than four pounds. A workman must not have in use at one time in any one place more than one of such cases or canisters. In charging holes for blasting (except in the case of such 'metalliferous mines' as may be excepted by the Secretary of State), an iron or steel pricker must not be used, and must not be in any person's possession; and an iron or steel tamping rod or stemmer must not be used for ramming either the wadding or the first part of the tamping or stemming on the powder. And a charge of powder, which has missed fire, must not be unrammed.[2] And the use of the like substance in the underground part of any 'coal mine' is subject to the following further restrictions:—(1) It must be contained in cartridges. (2) During three months after inflammable gas has been found a competent person must, immediately before firing the shot, examine the place where it is to be used, and the contiguous places, and must not allow the firing unless he finds it safe; and a shot must not be fired except under his direction. (3) During the like three months, if the gas issued so freely that it showed a blue cap on the flame of the safety-lamp, it must only be used either (*a*) in those cases of stone drifts, stone work, and sinking of shafts, in which the return air from the place of use passes into the main return air course without passing any place in course of working; or (*b*) where the persons employed are out of the place of use. And (4), where a mine is divided into separate panels, having each an independent intake and return airway from the main air courses, the provisions respecting the substance in question apply to each panel, as if it were a separate mine.[3]

Exemptions from restrictions.

However, a stratified ironstone mine in the lias formation,

[1] S. 51 (26).

[2] S. 51 (8); Met. Mines Act. s. 23 (2).

[3] Coal Mines Act, s. 51 (8). See further, as to explosive substances. *post*, p. 598.

may, on the application of the 'owner,' 'agent,' or manager, be exempted by a Secretary of State from the first of the further restrictions, which would otherwise apply to it as a 'coal mine.' And a slate mine may in like manner be exempted from the conditions, which would otherwise apply to it as a 'metalliferous mine.' But every such application must be transmitted to the district inspector, and the requirements[1] as to the posting of proposed special rules apply thereto. And the Secretary of State may at any time revoke the exemption, upon causing twenty-four hours' notice thereof to be posted up at the mine. And the district inspector must, in his annual report,[2] set forth a list of the exemptions so granted or revoked.[3]

Water and bore-holes.

Where there is likely to be a dangerous accumulation of water in a 'coal mine,' the working approaching the place of danger must not exceed eight feet in width; and there must be constantly kept, at not less than five yards in advance, one bore-hole near the centre of the working, and flank bore-holes on each side.[4]

Stations—withdrawal and re-admission of workmen.

A station or stations must be appointed at the entrance to every 'coal mine,' or to different parts, as the case may require; beyond which workmen are prohibited from passing, until the mine or part in question has been inspected, and stated to be safe.[5] If at any time it is found by the person in charge, that, by reason of any cause whatever, the mine or part in question is dangerous, every workman must be withdrawn; and a competent person must make an inspection (and with a locked safety-lamp, if the danger arises from inflammable gas), and must make a true report; and workmen must not, except to inquire into or remove the cause of danger, or to explore, be readmitted into the mine or such part, until the same is stated by the report not to be dangerous. Every report must be recorded in a specified book, and signed by the person making it.[6]

Man-holes and refuges.

Every underground plane, on which persons travel, which is

[1] *Post*, pp. 592—594.

[2] *Post*, p. 605.

[3] See 44 & 45 Vict. c. 26, s. 2 (Strat. Ironst. Mines Gunp. Act. 1881); 45 Vict. c. 3, s. 2 (Slate Mines Gunp. Act, 1882).

[4] Coal Mines Act, s. 51 (9).

[5] S. 51 (5).

[6] S. 51 (6). See, as to these provisions, R. *v.* Spon Lane Colliery Co., 3 Q. B. D. 673.

self-acting, or worked by an engine, windlass, or gin, must (if exceeding thirty yards in length) have proper means of signalling between the stopping places and the ends; and (in every case) have, at intervals of not more than twenty yards, sufficient man-holes for refuge. Every road, on which persons travel underground, must, in the case of a 'coal mine,' where the load is drawn by a horse or other animal, have, at intervals of not more than fifty yards; and in the case of a 'metalliferous mine,' where the produce in transit exceeds ten tons in any one hour over any part, and the load is drawn by a horse or other animal, have, at intervals of not more than one hundred yards; sufficient spaces for refuge. Each space must be of sufficient length, and of at least three feet in width between the waggons and the side; and in the case of a 'metalliferous mine' the Secretary of State may require the inspector to certify whether the produce in transit does or does not exceed the specified weight. Every man-hole and space for refuge must be constantly kept clear, and access thereto kept open.[1]

b. Special Rules.[2]

'Coal mines'—generally.

The establishment in every 'coal mine' of such special rules (in addition to the general rules), as under the particular circumstances of the case appear best calculated to prevent accidents and to provide for proper discipline, is by the Coal Mines Act rendered compulsory. These rules are in the first instance framed by the 'owner,' 'agent,' or manager. They are then posted up in legible characters, in some convenient place at or near the mine; and a printed notice is posted up with them, stating, that any objection to them by any of the persons employed may be sent to the district inspector; whose address is given. After an interval of not less than two weeks, and of less than three months after the commencement (if commenced subsequently to the commencement of the Act[3]) of any working to which they relate, they are required to be transmitted to

[1] Coal Mines Act, s. 51 (10), (11), (12); Met. Mines Act, s. 23 (3), (4), (5).

[2] So called in the Acts. As to special rules in existence at the commencement of the Coal Mines Act, see s. 75 of the Act.

[3] See Coal Mines Act, s. 2.

the district inspector for approval by the Secretary of State; accompanied by a certificate of the posting up signed by the sender. If they are not objected to within forty days, they become established.[1] If they are objected to, modifications may within that time be proposed therein; and, if the 'owner,' 'agent,' or manager does not within twenty days object to the modifications, the rules, with the modifications, become established. But if an objection is sent in within twenty days, the matter is referable to arbitration, and the rules become established as settled by the award; the date of the receipt of the objection being deemed to be the date of the reference.[2] Special rules, when established, must be signed by the district inspector.[3] Special rules may be amended or added to at the instance either of the 'owner,' 'agent,' or manager, or of the Secretary of State; similar proceedings, as nearly as possible, taking place before the amended or new rules become established, to those which take place before the original rules become established.[4]

'Metalliferous mines'—generally.

The 'owner' or 'agent' of any 'metalliferous mine' may, if he thinks fit, transmit to the district inspector proposed special rules of a similar kind, accompanied by a similar certificate; previously posting them up in a similar manner, for a similar interval, and with a similar printed notice.[5] And these rules become established, or become established with modifications, in a similar manner.[6] And they may be amended or added to in a similar manner at the instance of the owner or agent.[7] The Secretary of State may, moreover, propose special rules to the 'owner' or 'agent' of a 'metalliferous mine,' in which there are no special rules; and, where there are special rules, he may propose amendments or additions. And the provisions with respect to a proposal for modifying the special rules transmitted by an 'owner' or 'agent' apply, as nearly as may be, to such proposed special rules, amendments, and additions.[8]

False statements—neglect

If the 'owner,' 'agent,' or manager, or the 'owner' or 'agent'

[1] Ss. 52, 53.
[2] S. 54. As to arbitrations, see *post*, pp. 600, 601.
[3] Coal Mines Act, s. 52.
[4] S. 55.
[5] Met. Mines Act, ss. 24. 25.
[6] Ss. 25, 26.
[7] S. 27.
[8] *Ib.*

of transmission—defacing notices, &c.

(as the case may be), makes any false statement with respect to the posting up of the rules and notices, he is guilty of an offence against the Act in question.[1] And if special rules are not transmitted to the inspector within the time limited by the Coal Mines Act, the 'owner,' 'agent,' and manager are each guilty of an offence, unless he proves that he had taken all reasonable means to secure the transmission.[2] Any person, who pulls down, injures, or defaces any proposed special rules, or any notice which may have been posted up, is guilty of an offence against the Act in question.[3]

Certified copy is evidence.

A copy of special rules must, if required, be certified by an inspector; and a copy so certified is evidence of the rules.[4]

Statutory force of special rules—offences.

All special rules when established must be observed as if they were enacted in the Acts; and non-observance by any person is an offence against the Act in question. And the 'owner,' 'agent,' and manager, or the 'owner' and 'agent' (as the case may be), are each also guilty of an offence, unless he proves that he had taken all reasonable means to prevent such non-observance.[5] Under this provision a miner may be convicted, although a special rule of the mine in question provides that he shall receive a copy of the special rules, and although there is no evidence that he has received it.[6] And the agent of a 'coal mine' may be convicted thereunder, although the mine is under the control of a duly certified manager.[7]

Howells *v.* Wynne—Higham *v.* Wright.

Special rules in force in a 'coal mine,' provided that the chartermaster should be the responsible manager of the pit; and that the banksman or hooker-on should take care that the persons descending should in no case exceed eight. The banksman violated the rule by lowering more than eight persons into the pit at one time; and there was evidence, that the chartermaster was close to the pit, and cognizant of the banks-

[1] Coal Mines Act, s. 56; Met. Mines Act, s. 25.

[2] Coal Mines Act, s. 56.

[3] S. 58; Met. Mines Act, s. 29.

[4] Coal Mines Act, s. 59; Met. Mines Act, s. 30.

[5] Coal Mines Act, s. 52; Met. Mines Act, s. 24. See also Coal Mines Act, s. 51 (28). Where special rules under the Coal Mines Act require the use of locked safety-lamps, the same provisions apply as those which apply to locked safety-lamps under the general rules: see Coal Mines Act, s. 51 (7); *ante*, p. 589.

[6] Higginson *v.* Hapley, 19 L. T. N. S. 690.

[7] Wynne *v.* Forrester, 5 C. P. D. 361

man's act. The banksman was the servant of the chartermaster. It was held, that the chartermaster might be convicted of aiding and abetting the banksman to commit a violation of the rule.[1] A special rule in force in a 'coal mine' provided that no person 'employed in or about the works' should ascend the pit contrary to the direction of the hooker-on. The workmen employed in the mine had power to dismiss themselves at a moment's notice; and certain of them dismissed themselves accordingly. They then asked the hooker-on to allow them to ascend the pit; but he refused to do so until the ordinary time came for workmen to quit the mine. They then ascended contrary to his direction. It was held, that they had been guilty of a breach of the rule.[2]

c. Other Causes of Danger.

(a) Generally.

Notice by inspector of causes of danger not otherwise provided for.

An inspector may give notice in writing to the 'owner,' 'agent,' or manager of any cause of danger not provided for by express provisions or special rules,[3] stating the particulars, and requiring the same to be remedied; and, unless the same be forthwith remedied, the inspector must report the same to the Secretary of State. If the 'owner,' 'agent,' or manager objects to remedy the matter in question, he may within twenty days state his objection in writing to the Secretary of State; and thereupon the matter is determinable by arbitration, the date of the receipt of the objection being deemed to be the date of the reference.[4] If the 'owner,' 'agent,' or manager fails within twenty days to comply either with the requisition of the notice, where no objection is sent in, or with the award made on arbitration, he is guilty of an offence against the Act in question. But the Court, if satisfied that he has taken active measures for compliance, may adjourn any proceedings for punishment;

[1] Howells *v.* Wynne, 15 C. B. N. S. 3; a decision on the repealed Act 23 & 24 Vict. c. 151.

[2] Higham *v.* Wright, 2 C. P. D. 397. As to liability for the non-employment of a particular person whose duties were defined by special rules, see Nimmo *v.* Clark, 10 Sess. Cas. (3rd ser.) 477; a Sc. decision under the rep. Act 23 & 24 Vict. c. 151.

[3] *Ante*, pp. 585, *et seq.*; p. 592.

[4] See *post*, 600, 601.

and, if the works are completed within a reasonable time, no penalty can be inflicted. Agreements inconsistent with observance of these provisions are void.[1]

R. *v.* Spon Lane Co.

The owners of a 'coal mine' were convicted under these provisions. The mine contained a perpendicular pit shaft at the same level as, and communicating with, a similar shaft in an adjoining mine, which did not belong to the owners of the mine in question. The district inspector gave notice to the owners, that an accumulation of water existed near to and in connexion with their mining works, which was dangerous, and tended to the bodily injury of the workmen employed; and he required them 'forthwith to remedy the matter.' The accumulation of water was in the pit shaft of the adjoining mine, and the owners of the mine in question had no power to interfere with the water; but it was shown, that, after the receipt of the notice, they did not remove the men at work in their own pit shaft and mine. It was held, that the conviction was wrong.[2] It was considered, that the provisions in question did not enable the inspector to give notice in cases where the source of danger was beyond the control of the occupiers of the mine; and that the only remedy was under the provisions as to the withdrawal of workmen in cases of danger.[3]

(β) *Single Shafts.*

Prohibitions as to single shafts.

The employment of persons in a 'coal mine' is in general prohibited, unless there are in communication with every seam at work at least two shafts or outlets, separated by natural strata of not less than ten feet in breadth, by which distinct means of ingress and egress are available (whether such two shafts or outlets belong to the same mine, or one or more of them to another mine); and unless there is a communication of not less than four feet wide and three feet high between such shafts or outlets; and unless there is at each of them, or upon the works, proper apparatus for raising and lowering persons at

[1] Coal Mines Act, s. 46; Met. Mines Act, s. 18.

[2] R. *v.* Spon Lane Co., 3 Q. B. D. 673; *nom.* Spon Lane Co. *v.* Baker, 48 L. J. M. C. 25; *per* Cockburn, C. J., and Mellor, J., Lush, J., dissenting.

[3] See *ante*, p. 591.

each of them. But the separation is not deemed incomplete by reason only that openings through the strata have been made for temporary purposes of ventilation, drainage, or otherwise; or, where inflammable gas has not been found within twelve months, for the same purposes, although not temporary.[1] Agreements in contravention of the prohibition are void.[2]

Exceptions from prohibition.

However the above general prohibition does not apply in the case either of opening a new mine to search for or prove minerals, or of any working for the purpose of making a communication between two or more shafts, so long as not more than twenty persons are employed below ground at any one time. Nor does it apply in the case of any proved mine, (1) so long as it is exempted by the Secretary of State on the ground either (*a*) that the quantity of mineral proved is not sufficient to repay the requisite outlay; or, (*b*) if the mine is not a coal mine, or mine with inflammable gas, that sufficient provision has been made against danger from other causes than explosions; or, (*c*) that the workings in any seam have reached the boundary, and that it is expedient to work away the pillars already formed, notwithstanding that one of the shafts or outlets may be thereby cut off: and (2) so long as there are not employed below ground at any one time more than twenty persons, or (if the mine is not a coal mine, or mine with inflammable gas) than such larger number as may be allowed by the Secretary of State. Nor does it apply in the case of any mine, one of the shafts or outlets of which has become, by reason of some accident, unavailable for use, so long as the mine is exempted by the Secretary of State, and the conditions of the exemption are observed.[3]

Offences as to single shafts.

Every 'owner,' 'agent,' and manager, who fails to observe the prohibition in question, is guilty of an offence against the Coal Mines Act. And (without prejudice to any other remedy for enforcing the Act) the High Court, whether any other proceedings have or have not been taken, may, upon the application of the Attorney-General, prohibit by injunction the working

[1] See Coal Mines Act. s. 20.

[2] S. 21.

[3] See s. 22. The Act also contained provisions exempting certain mines, on the ground of their being nearly exhausted, and extending the time for other mines (s. 24); but these provisions can hardly now be of practical importance.

of any mine, in which any person is employed in contravention of the prohibition; and may award such costs as it thinks just. But not less than ten days' notice in writing of the intention to apply for such injunction must be given to the 'owner,' 'agent,' or manager.[1]

(γ) *Explosive Substances.*

Explos. Act, 1875.

Where a magazine or store is established by the 'owner' for the purpose of any mine governed by either Act, the Secretary of State may direct an inspector under either Act to act with respect to such magazine or store as a government inspector under the Explosives Act, 1875,[2] and may revoke any such order. And such inspector, while such order is in force, has for that purpose the same powers and authorities as he has under the Coal Mines Act, and the Met. Mines Act, and also the powers and authorities of a government inspector under the Explosives Act, 1875.[3]

(δ) *Fencing of Abandoned Mines.*

Fencing of abandoned mines—generally.

Where any mine governed by either Act is abandoned, or the working discontinued, at whatever time such abandonment or discontinuance occurred, the 'owner,' and 'every other person interested in the minerals,' must cause the top of the 'shaft,' and any side entrance from the surface, to be and be kept securely fenced for the prevention of accidents. But (subject to any contract to the contrary) the 'owner' is, as between himself and any other such person, liable to carry, and to pay any costs incurred by any other such person in carrying, this provision into effect. And the provision does not exempt any person from liability under any other Act or otherwise.[4] As the provision applies, "at whatever time the abandonment or discontinuance occurred," it is not confined to mines abandoned or discontinued since the Act in question came into operation.[5]

[1] See s. 20.

[2] 38 & 39 Vict. c. 17.

[3] S. 59. See further, as to explosive substances, *ante*, p. 590.

[4] Coal Mines Act, s. 41; Met. Mines Act, s. 13.

[5] See Stott *v.* Dickinson, 34 L. T. 291. The law as regulated by the repealed Act, 23 & 24 Vict. c. 151, s. 21, did not apply to mines abandoned before the passing thereof: see R. *v.* Gratrex, 12 Cox C. C. 157.

Where, however, in the case of a mine governed by the Met. Mines Act, the abandonment or discontinuance occurred before the passing of that Act, the provision applies only to such 'shaft' or side entrance of the mine as is situate within fifty yards of a highway, road, footpath, or place of public resort, or in open or uninclosed land; or is required by an inspector to be fenced, on the ground that it is specially dangerous.[1] Non-observance of the provision is an offence against the Act in question.[2]

A person, who has been the lessee of a 'coal mine,' but whose lease has determined by lapse of time, is not an 'owner' within the Coal Mines Act; and is not therefore amenable to this provision.[3] And a lessee under the Duchy of Lancaster of a lead mine, and of the duties arising therefrom, who holds subject to the Derbyshire custom;[4] and who is bound by his lease to pay to the Duchy by way of rent all he might annually receive in respect of the mine, and an additional rent of five shillings; is neither an 'owner,' nor a 'person interested in the minerals' within the Met. Mines Act. For he has no pecuniary interest either in the mine or the minerals.[5] Persons, who were the owners in fee of a 'metalliferous mine,' demised it for a term of years. Royalties were reserved; and were made payable upon the place where the ore should be gotten and weighed, and before it should be taken away. Powers of distress and entry, if the royalties should be in arrear, were also reserved. While the lease was still in force the lessees ceased working, and allowed the mine to remain insufficiently fenced. It was held, that the owners in fee, although not 'owners' within the Met. Mines Act, were 'other persons interested in the minerals,' and were guilty of an offence accordingly.[6] It was laid down in the same case, that the words 'other persons interested in the minerals' referred to persons having a present interest; and did not refer to persons having a remote interest, or an interest arising merely from contract; and that they did not refer to trustees or *cestuis que trust*.

Stott *v.* Dickinson—Arkwright *v.* Evans—Evans *v.* Mostyn.

[1] Met. Mines Act, s. 13.

[2] Coal Mines Act, s. 41; Met. Mines Act, s. 13.

[3] Stott *v.* Dickinson, *u. s.*

[4] See *ante*, pp. 500, *et seq.*

[5] Arkwright *v.* Evans, 49 L. J. M. C. 82.

[6] Evans *v.* Mostyn, 2 C. P. D. 547.

Nuis. Rem. Act, 1855.

In addition to the above provision, any 'shaft' or side entrance, which is not fenced as required, and is within fifty yards of any highway, road, footpath, or place of public resort, or is in open or uninclosed land, is a nuisance within sect. 8 of the Nuisances Removal Act, 1855, as amended by the Sanitary Act, 1866.[1]

Sect. 7.—Arbitration.

Parties to arbitration.

The 'owner,' 'agent,' or manager of a 'coal mine,' or the 'owner' or 'agent' of a 'metalliferous mine,' on the one hand; and the inspector (on behalf of the Secretary of State), on the other hand; are the parties to an arbitration. The death or removal of, or other change in, any party does not affect the proceedings.[2]

Arbitrators and their appointment.

Each of the parties may within twenty-one days after the reference appoint an arbitrator. The appointment must be in writing, and notice must be forthwith sent to the other party, and the appointment is irrevocable without his consent. If within the twenty-one days either party fails to appoint, the arbitrator appointed by the other may determine the matter in difference. If before the award any arbitrator dies, or becomes incapable to act, or for fourteen days refuses or neglects to act, his appointor may appoint a substitute; and if he fails to do so within fourteen days after notice from the other party, the remaining arbitrator may determine the matters in difference. However, in either of the foregoing cases, the party failing to appoint may, before the single arbitrator has actually proceeded, appoint an arbitrator, who may then act as if no failure had been made. If a single arbitrator fails to make his award within twenty-one days, his appointor may appoint another arbitrator in his place.[3]

Umpire and his appointment.

If the arbitrators fail to make their award within twenty-one days, or within such extended time as they may have appointed, the matter in difference is determinable by their umpire. The

[1] Coal Mines Act. s. 41; Met. Mines Act. s. 13. See further, as to fencings, *ante*, pp. 586, 587.

[2] Coal Mines Act. s. 49; Met. Mines Act. s. 21.

[3] *Ib.*

arbitrators must, before they enter upon the arbitration, appoint an umpire by writing. If the umpire dies or becomes incapable to act, or refuses to make his award, the arbitrators must forthwith appoint another umpire; and on refusing, or failing, or for seven days after request neglecting, to do so, an umpire may, on the application of either party, be appointed by the Chairman of the district General or Quarter Sessions.[1]

Qualifications of arbitrators and umpire.

No person can act as arbitrator or umpire who is employed in or in the management of, or is interested in, the mine in question. And every person who is appointed must be a practical mining engineer, or a person accustomed to the working of mines; but, when an award has been once made, the arbitrator or umpire is deemed to have been qualified.[2]

Proceedings—remuneration—costs.

The arbitrators and their umpire, or any of them, may examine the parties and their witnesses on oath; and they may consult any counsel, engineer, or scientific person. The remuneration of the arbitrators or the umpire must be fixed by the Secretary of State; and, with the costs, must be paid as the award may direct. The costs may be taxed by a Master of the High Court. The amount (if any) payable by the Secretary of State is payable as part of the expenses of inspectors under the Acts. The amount (if any) payable by the 'owner' 'agent' or manager, or by the 'owner' or 'agent' (as the case may be), is recoverable in the same manner as penalties under the Acts.[3]

SECT. 8.—ACCIDENTS AND INQUESTS.

Accidents.

Where in or about any mine to which either Act applies, either above or below ground, either loss of life or personal injury to any person employed occurs by reason of any explosion of gas, or powder, or of any steam boiler; or loss of life or serious personal injury to any such person occurs by reason of any accident whatever; the 'owner,' 'agent,' or manager, or the 'owner' or 'agent' (as the case may be), must within twenty-four hours notify the facts to the district inspector; specifying the character of the explosion or accident, and the number of

[1] *Ib.* [2] *Ib.* [3] *Ib.*

persons killed and injured. And where any such personal injury results in death, he must notify the death to the inspector within twenty-four hours after it comes to his knowledge. Non-observance of these provisions is an offence against the Act in question.[1]

Inquests.

Where a coroner holds an inquest upon the body of any person, whose death may have been caused by any explosion or accident in a mine governed by either Act, of which notice should be given, the coroner must adjourn the inquest, unless an inspector, or some person on behalf of the Secretary of State, is present. And he must give to the district inspector at least four days' notice in writing of the time and place of holding the adjourned inquest. If, however, the explosion or accident has not occasioned the death of more than one person, and the coroner has given to the district inspector not less than forty-eight hours' notice of the time and place of holding the inquest, he need not adjourn, if the majority of the jury think that course unnecessary. And, in any case, before an adjournment, he make take evidence to identify the body, and may order the interment. An inspector may at any inquest examine a witness, subject to the order of the coroner. Where evidence is given at an inquest at which an inspector is not present of any neglect as having caused or contributed to the explosion or accident, or of any defect appearing to the coroner or jury to require a remedy, the coroner must give notice to the district inspector of such neglect or default. Any person having a personal interest in, or employed in or in the management of, the mine in question, is disqualified from serving on the jury. Non-observance of these provisions is an offence against the Act in question.[2]

[1] Coal Mines Act, s. 39 ; Met. Mines Act, s. 11. As to the disposition of the consequent penalties, see *ante*, p. 574. The repealed Act, 18 & 19 Vict. c. 108, s. 9, only provided for sending the notice 'within twenty-four hours next after such loss of life' : see the consequent decision thereon of Underhill *v.* Longridge, 29 L. J. M. C. 65.

[2] Coal Mines Act, s. 50 ; Met. Mines Act, s. 22.

Sect. 9.—NOTICES OF OPENINGS, ABANDONMENTS, AND CHANGES—PLANS.—RETURNS AND REPORTS.

(a) *Notices of Openings, Abandonments, and Changes.—Plans.*

Notices of openings, abandonments, and changes.

Where any working is commenced for the purpose of opening a new 'shaft' for any mine governed by either Act; or where a 'shaft' of any such mine is abandoned, or the working discontinued; or where the working of a 'shaft' of any such mine is re-commenced after any abandonment or discontinuance for a period not exceeding two months; or where any change occurs in the name of, or in the name of the 'owner,' 'agent,' or manager, or the 'owner' or 'agent' (as the case may be), of any such mine, or in the officers of any incorporated company which is the owner of any such mine; the 'owner,' 'agent,' or manager, or the 'owner' or 'agent' (as the case may be), must give notice to the district inspector within two months; and, in default, is guilty of an offence against the Act in question. But, in the case of a 'metalliferous mine,' these provisions apply only where more than twelve persons are ordinarily employed below ground; and, in the case of a partnership working such a mine within the Stannaries, if notice of every change in the purser is sent, notice of a change in the members need not be sent.[1]

Plans.

Where any 'coal mine;' or any 'metalliferous mine,' in which more than twelve persons have ordinarily been employed below ground; is abandoned, the owner at the time of the abandonment must within three months send to the Secretary of State an accurate plan, showing the boundaries of the workings up to the time of the abandonment; and, in default, is guilty of an offence against the Act in question. But no person, except an inspector, is entitled, without the consent of the 'owner,' to see the plan of a 'coal mine,' or, without the license of the Secretary of State, to inspect or copy the plan of a 'metalliferous mine,' until after the lapse of ten years from the abandonment

[1] Coal Mines Act, s. 40; Met. Mines Act, s. 12. See *ante*, p. 449.

of the 'coal mine,' or ten years from the receipt of the plan of the 'metalliferous mine.'[1]

(β) *Returns and Reports.*

Returns as to quantity of mineral, number of persons employed, &c.

On or before the 1st of February in every year the 'owner,' 'agent,' or manager, or the 'owner,' or 'agent' (as the case may be), must send to the district inspector a correct return, specifying with respect to the year ending on the preceding 31st of December, in the case of a 'coal mine,' the quantity of mineral wrought; and, in the case of a 'metalliferous mine,' the quantity in statute weight of the mineral dressed, and of the undressed mineral which has been sold, treated, or used; and, in each case, the number of persons ordinarily employed below and above ground, distinguishing the persons employed below and above, and the classes and ages of the persons so employed, whose hours of labour are regulated by the Act in question. And every person who makes default is guilty of an offence against the Act. However, in any 'metalliferous mine,' where not more than twelve persons are employed underground, the returns as to the quantity of mineral must be made by the Barmaster or other officer (if any) employed to collect the dues or royalty; and, where there is such a Barmaster or other officer, the 'owner' or 'agent' need not send any return as to the number of persons employed. In the case of 'coal mines,' the aggregate results of the returns with respect to a particular county or district, or any large portion thereof, may be published; but the individual return cannot be either published or seen except with the consent of the person making it, or of the 'owner.' Forms of returns may be obtained from the district inspector.[2]

Other returns.

And the 'owner,' occupier, or manager of every 'coal mine' must, on the 1st of January in every year, and at any other time when required by the Secretary of State, send to the district inspector a return specifying the average number of persons employed daily, above and below ground; the mode of

[1] Coal Mines Act. s. 42; Met. Mines Act. s. 14.

[2] Coal Mines Act. s. 38; Met. Mines Act, s. 10; 38 & 39 Vict. c. 39 (Met. Mines Reg. Act, 1875). As to Barmasters, see *ante*, pp. 503, 504.

ventilation ; the furnace or fan used ; the diameter and depth of the downcast and upcast shafts ; the number of splits and the quantity in cubic feet per minute ; the average length of the airways ; the sectional area of the airways ; and the average total quantity of fresh air in cubic feet per minute.[1]

Reports of inspectors.

Inspectors under either Act must make annual reports of their proceedings to the Secretary of State ; to be laid before both Houses of Parliament.[2] The report under the Coal Mines Act must contain the name of every teacher disqualified for granting certificates of attendance of boys at school, and the name of the school at which he taught ; for communication to the Committee of Council on Education.[3] The Secretary of State may also direct inspectors to make special reports as to accidents which have caused loss of life or personal injury ; which may be made public at such time and in such manner as he thinks expedient.[4]

Reports of examining boards and Courts of inquiry.

Boards for appointing examiners for granting certificates of competency to managers under the Coal Mines Act must make a report and return of their proceedings to the Secretary of State, and of such other matters as he may from time to time require.[5] And courts of inquiry into the competency of managers must, upon the conclusion of the inquiries, send full reports to the Secretary of State.[6]

Sect. 10.—Publication of Acts and Special Rules.

Publication.

For the purpose of making known the Act in question and the special rules (if any)[7] to all persons employed, the 'owner,' 'agent,' or manager, or the 'owner' or 'agent' (as the case may be), must cause an abstract of the Act (which is obtainable from the district inspector) ; and a copy of the special rules (if any) ; with the name and address of the district inspector, and the name of the 'owner' or 'agent,' and of the manager, or of

[1] Coal Mines Act, s. 69 ; sch. 4. See sch. 4 for the form of the return.

[2] Coal Mines Act, s. 48 ; Met. Mines Act. s. 20.

[3] Coal Mines Act, s. 10. See *ante*, p. 581.

[4] S. 48 ; Met. Mines Act, s. 20.

[5] See s. 28. See *ante*, p. 577.

[6] S. 32. See *ante*, p. 577.

[7] Special rules do not necessarily exist in the case of a metalliferous mine : *ante*, p. 593.

the 'owner' or 'agent' (as the case may be), appended thereto; to be posted up in legible characters, in some conspicuous place at or near the mine. And, as often as the same become defaced, obliterated, or destroyed, he must cause them to be renewed. And he must supply a printed copy of the abstract and the special rules (if any) gratis to each person employed, who applies at the office at which the persons employed are paid. In the event, in the case of a 'coal mine,' of non-compliance with these provisions by any person whomsoever, the 'owner,' 'agent,' and manager are each guilty of an offence against the Coal Mines Act, unless he proves that he had taken all reasonable means to prevent the non-compliance.[1] And if, in the case of a 'metalliferous mine,' the owner or agent fails to comply therewith, he is guilty of an offence against the Met. Mines Act, unless he proves that he had taken all reasonable means to prevent the non-compliance.[2]

Defacing abstract or rules.

Any person who pulls down, injures, or defaces any notice, abstract, or special rules, when posted up in pursuance of the Acts, is guilty of an offence against the Act in question.[3]

PART B.—OTHER ACTS.

(a) *Factory and Workshop Acts.*

Statutory meanings of 'non-textile factory,' and 'workshop.'

Under the Factory and Works. Act, 1878,[4] a 'non-textile factory' includes (1) works for making earthenware, except bricks and tiles, not being ornamental tiles: (2) blast or other furnaces or premises, where the process of smelting or otherwise obtaining any metal from the ores is carried on: (3) copper mills: (4) mills or premises, where any process is carried on for converting iron into malleable iron, steel, or tin plate, or for otherwise making or converting steel; and (5) iron foundries, copper foundries, brass foundries, and other premises, where the process of founding or casting metal is carried on, except where

[1] Coal Mines Act, s. 57.
[2] Met. Mines Act, s. 28.
[3] Coal Mines Act, s. 58; Met. Mines Act, 29.
[4] 41 Vict. c. 16.

such process is carried on by not more than five persons, and as subsidiary to the repair and completion of some other work.[1] And a 'workshop' includes (1) "quarries, that is to say, any place, not being a mine, in which persons work in getting slate, stone, coprolites, or other minerals;" and (2) "pit-banks, that is to say, any place above ground adjacent to the shaft of a mine, in which place the employment of women is not regulated by the Coal Mines Reg. Act, 1872, or the Met. Mines Reg. Act, 1872, whether such place does or does not form part of the mine within the meaning of those Acts."[2]

Provisions of Acts.

The Factory and Works. Act, 1878, makes unlawful the employment of girls under the age of sixteen years in the making or finishing of bricks or tiles, not being ornamental tiles; or in the making or finishing of salt.[3] And it makes unlawful the taking of meals by 'children,' 'young persons,' or 'women,' in those portions of earthenware works known as the 'dippers' house,' 'dippers' drying room,' and the 'china scouring room.'[4] But many of its provisions as to meal hours do not, in the case of 'children,' 'young persons,' and 'women,' apply to blast furnaces or iron mills.[5] And the provisions of the Fact. and Works. Acts, 1878 and 1883, as to 'young persons' and 'women' working overtime do not apply to premises, where the making or finishing of bricks or tiles, not being ornamental tiles, is carried on.[6] And the provisions of the former Act as to the employment of 'children,' 'young persons,' and 'women,' for an additional half-hour do not apply to iron mills, where male 'young persons' are not employed during any part of the night.[7] And its provisions as to the employment of male 'young persons' during the night do not apply to blast furnaces or iron mills.[8]

[1] S. 93; sch. 4. part 1.

[2] S. 93; sch. 4, part 2. As to the Regulation Acts, see *ante*, pp. 569, 570, 579, *et seq.* The Factory Act. 30 & 31 Vict. c. 103 (repealed), did not apply to slate quarries worked in the open air (Kent *v.* Astley, L. R. 5 Q. B. 19), or to works in the open air for the manufacture of cement from chalk and mud (Redgrave *v.* Lee, 9 *ib.* 363).

[3] S. 38; sch. 1.

[4] S. 39; sch. 2.

[5] Sch. 3. part 2.

[6] S. 53; sch. 3, part 3; 46 & 47 Vict. c. 53, s. 13.

[7] 41 Vict. c. 16, s. 54; sch. 3, part 4.

[8] S. 58; sch. 3, part 6. As to the statutory meanings of 'child,' 'young person,' and 'woman,' see s. 96.

(β) *Truck Act.*[1]

Application of Act—statutory meanings of 'artificer' and 'employer.'

The Truck Act applies to persons employed in or about the making, casting, converting, or manufacturing of iron or steel, or any parts, branches, or processes thereof; or in or about the working or getting of any mines of coal, ironstone, limestone, or salt rock; or in or about the working or getting of stone, slate, or clay; or in the making or preparing of salt, bricks, tiles, or quarries; or in or about the making or otherwise preparing of any porcelain, china, or earthenware, or any parts, branches, or processes thereof.[2] The word 'artificers' means all workmen, labourers, and other persons employed in or about the trades and occupations specified in the Act. And the word 'employers' means all masters, bailiffs, foremen, managers, clerks, and other persons engaged in the hiring, employment, or superintendence of the labour of any such artificers.[3]

Payment of wages in coin.

In contracts for the hiring of 'artificers' wages must be made payable in the current coin of the realm or in bank-notes; and must not contain any stipulation as to the manner of expending them. And wages must be paid in coin or bank-notes; and wages not so paid may be recovered. And in an action for wages no set-off is allowed for goods supplied by the 'employer;' and no 'employer' has any right of action against his 'artificer' for goods supplied on account of wages. And if the 'artificer,' or his wife or children become chargeable to the parish, the overseers may recover any wages earned within three months, and not paid in coin or bank-notes. But these provisions do not invalidate the payment of wages in drafts payable to bearer on demand, if the 'artificer' consents.[4] An 'employer,' who enters into contracts or makes payments declared illegal by the Act, is liable to penalties.[5]

Decisions as to 'artificer.'

Where a person contracts to load ironstone at so much per ton, but without any stipulation for his own personal labour; and he employs men to do the work under him, and from time

[1] 1 & 2 Will. 4, c. 37.
[2] S. 19.
[3] S. 25.
[4] Ss. 1 to 8, inclusive.
[5] S. 9. For proceedings for their recovery, see ss. 10 to 18, inclusive; ss. 21, 22.

to time works personally; he is not an 'artificer.'[1] And where a labourer enters into a contract to make as many bricks as the employer requires, on the terms, that the employer shall find clay and all materials, and the labourer all the labour, and that the payment shall be 10*s.* 6*d.* per thousand; and the labourer does part of the work himself, and employs others to do the rest; he is not an 'artificer.'[2] But a collier employed to get coal from a mine at so much a ton, and having liberty to employ other men to assist him, is an 'artificer,' if by his contract he is bound to give his personal labour in the performance of the work.[3] 'Butty colliers,'[4] who are bound to work personally, and who do so work, are 'artificers.'[5] But 'butty colliers,' who bind themselves not for mere labour, but for the result of labour, are not 'artificers.'[6] It is questionable whether a labourer, who is employed to make a cutting on a railway, and who for that purpose removes clay which is used for making bricks, is employed 'in or about the working or getting of clay' within the Act.[7]

Exceptions from Act.

As exceptions from the operation of the Act, it is provided that an 'employer' or his agent may supply, or contract to supply, to an 'artificer' any medicine, or medical attendance, or any fuel, or any materials, tools, or implements for mining purposes; and may demise to him the whole or any part of any tenement at any rent to be thereon reserved; and may advance to him any money for contribution to a friendly society or savings' bank, or for his relief in sickness, or for the education of his children. And corresponding deductions may be made, or contracted to be made, from the wages of the 'artificer,' if they are not excessive in amount, and if the contract for them is in writing and signed by the 'artificer.'[8] In order to bring a contract for the supply of materials within the exceptions from the Act, it must be a contract of sale, and not a mere contract of hiring.[9] But the amount to be deducted in respect

[1] Sharman *v.* Sanders, 13 C. B. 166. Cf. Riley *v.* Warden, 2 Exch. 59.

[2] Ingram *v.* Barnes, 7 E. & B. 115.

[3] Weaver *v.* Floyd, 21 L. J. Q. B. 151. See also Ingram *v.* Barnes, *u. s.*

[4] See *ante*, p. 520, n. [4].

[5] Bowers *v.* Lovekin, 6 E. & B. 584.

[6] Sleeman *v.* Barrett, 2 H. & C. 934.

[7] See Riley *v.* Warden, 2 Exch. 59.

[8] See ss. 23 & 24. See Pillar *v.* Llynvi, &c., Co., L. R. 4 C. P. 752.

[9] Cutts *v.* Ward, L. R. 2 Q. B. 357.

of each head of deduction need not be specified in the contract.[1] And where a contract allowed a deduction for medicine and medical attendance; and by the practice of the mine in question 6*d.* a week was paid by each miner towards a club kept by the employer for the purpose of providing medicine and medical attendance for such miners as required them; the employer was held entitled to deduct that amount.[2]

(γ) *Employers and Workmen Act.*

Empl. and Work. Act, 1875.

For the purposes of the Empl. and Workmen Act, 1875,[3] which regulates disputes between employers and workmen, 'workman' includes any miner, whether under or above the age of twenty-one years, who has entered into or works under a contract with an employer, express or implied, oral or in writing, being a contract of service or a contract personally to execute any work or labour.[4]

(δ) *Employers' Liability Act.*

Statutory meanings of 'employer,' 'workman,' &c.

For the purposes of the Empl. Liability Act, 1880,[5] unless the context otherwise requires, the following words or expressions have or include the following meanings:—'Person who has superintendence entrusted to him' means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour. 'Employer' includes a body of persons corporate or unincorporate. And 'workman'

Wooden 'sprags' for propping up a mine were in the same case held to be 'materials.'

[1] Cutts *v.* Ward. L. R. 2 Q. B. 357.

[2] *Ib.* See further, as to the Act, Macdonell on Mast. and Serv., pp. 366, *et seq.*

[3] 38 & 39 Vict. c. 90.

[4] S. 10. See further, as to the Act, Macdonell on Mast. and Serv., pp. 630, *et seq.* The Acts 20 Geo. 2, c. 19; 6 Geo. 3, c. 25; and 4 Geo. 4, c. 34, with the Mast. and Serv. Act, 1867 (30 & 31 Vict. c. 141), which formerly regulated disputes arising out of contracts between mine owners and miners, are now repealed: see 38 & 39 Vict. c. 86, s. 17. The Act 57 Geo. 3, c. 122, extends the provisions of the Act 12 Geo. 1, c. 34, to labourers in collieries: and thereby entitles them, upon non-payment of their wages, to obtain warrants from the justices of the peace for levying such wages by distress and sale of the offenders' goods. As to frauds by persons engaged in iron manufactures, see 1 Anne, St. 2, c. 22; 13 Geo. 2, c. 8; 22 Geo. 2, c. 27; and 17 Geo. 3, c. 56.

[5] 43 & 44 Vict. c. 42.

means any person to whom the Empl. and Workmen Act, 1875, applies.[1]

Where personal injury is caused to a 'workman' by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the 'employer,' such 'workman;' or in case the injury results in death, his legal personal representatives, and any persons entitled in case of death; have the same right of compensation and remedies against the 'employer,' as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work. But a workman is not entitled to this right, unless the defect arose from, or had not been discovered or remedied owing to the negligence of the 'employer,' or of some person in his service, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.[2] A similar right exists, where personal injury is caused by reason of the negligence of any 'person' in the service of the 'employer,' who has any 'superintendence entrusted to him,' whilst in the exercise of such superintendence; or by reason of the negligence of any person in the service of the 'employer,' to whose orders or directions the 'workman' at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed. And a similar right exists, where personal injury is caused by reason of the act or omission of any person in the service of the 'employer' done or made in obedience to the rules or bye-laws of the 'employer,' or in obedience to particular instructions given by any person delegated with the authority of the 'employer.' But a 'workman' is not entitled to the last-mentioned right, unless the injury resulted from some impropriety or defect in the rules, bye-laws, or instructions in question; and where a rule or bye-law has been approved, or accepted as a proper rule or bye-law, by a Secretary of State or the Board of Trade or any other Government department under any Act of Parliament, it is not an improper or defective rule or bye-law. Nor is a 'workman' entitled to any of such rights,

Remedy for personal injury.

[1] S. 8: see *ante*, p. 610.

[2] Ss. 1, 2. See McGiffin *v.* Palmer's, &c., Co., 10 Q. B. D. 5.

where he knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information to the 'employer,' or some person superior to himself in the service of the 'employer;' unless he was aware that the 'employer' or such superior already knew of such defect or negligence.[1]

Amount of compensation —procedure.

However, the amount of compensation recoverable under the Act must not exceed the estimated earnings, during the three years preceding the injury, of a person in the same grade, in the like employment, and in the same district.[2] And an action is not maintainable unless notice of the injury be given within a prescribed time, and in a prescribed manner,[3] and the action be commenced within a prescribed time.[4] And every action must be brought in a county court.[5]

Where Act not applicable.

Notwithstanding the Act an employer is not liable for the negligence of a person who, although remaining his general servant, is, at the time of the accident in question, under the

[1] Ss. 1, 2.

[2] S. 3.

[3] See ss. 4, 7. The notice must be in writing: Moyle *v.* Jenkins, 8 Q. B. D. 116.

[4] See ss. 4, 7.

[5] S. 6. This Act has made an important change in the law. Formerly, unless an employer was guilty of personal negligence (Brydon *v.* Stewart, 2 Macq. 30; Griffiths *v.* Gidlow, 3 H. & N. 648; Senior *v.* Ward, 1 E. & E. 385; Ashworth *v.* Stanwix, 3 *ib.* 701; Mellors *v.* Shaw, 1 B. & S. 437), he was free from all liability for the death of or injury to a workman caused by the negligence of a fellow-workman; the doctrine of common employment applying: see Bartonshill Coal Co. *v.* Reid, 3 Macq. 266, and cases there cited; Rourke *v.* White, &c., Co., 1 C. P. D. 556, 2 *ib.* 205. And it was immaterial, whether the workman who caused the injury was, for instance, the person who let the miners down into, and afterwards brought them up from, the mine (Bartonshill Coal Co. v. Reid, *u. s.*, 296; Senior *v.* Ward, *u. s.*) or was the 'underlooker' of the mine (Hall *v.* Johnson, 3 H. & C. 589); or was the manager, whether appointed without reference to statute (Wilson *v.* Merry, L. R. 1 Sc. & D. 326), or appointed in obedience to the Coal Mines Reg. Act. 1872 (Howells *v.* Landore Co., L. R. 10 Q. B. 62: see *ante*, p. 576). Workmen, it was held, did not cease to be fellow-workmen, because they were not all equal in station or authority (Wilson *v.* Merry, *u. s.*). And, according to a dictum of Lord Chelmsford, civil freedom from liability for injuries was not diminished by the Reg. Acts (Wilson *v.* Merry, *u. s.*, 339, *et seq.*: but see the Sc. case of Edgar *v.* Law, 10 Sess. Cas. (3rd ser.) 236: see *ante*, pp. 569 *et seq.*). However, even before the Act, if one member of a partnership was guilty of an act of negligence causing death or injury to a workman, and the act occurred in a matter within the scope of the partnership undertaking, all the partners were liable (Ashworth *v.* Stanwix, 3 E. & E. 701; Mellors *v.* Shaw, 1 B. & S. 437).

orders and control of another employer.[1] And negligence on the part of the workman killed or injured may be pleaded as a defence to an action.[2] And a workman may contract himself out of the Act.[3]

[1] Rourke *v.* White, &c., Co., 1 C. P. D. 556, 2 *ib.* 205.

[2] Griffiths *v.* Gidlow, 3 H. & N. 648; Senior *v.* Ward, 1 E. & E. 385.

[3] Griffiths *v.* Dudley, 9 Q. B. D. 357. See, generally, as to the Act, Macdonell on Mast. and Serv., pp. 654, *et seq.*

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